Supreme Court of the United States

OCTOBER TERM, 1962

No. 791

UNITED STATES, ET AL., APPELLANTS

vs.

J. B. MONTGOMERY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action File No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

[File Endorsement Omitted]

COMPLAINT—Filed January 16, 1962

I

Plaintiff, J. B. Montgomery, Inc., is a corporation organized and existing under the laws of the State of Nebraska, with its principal office being located at 5150 Brighton Boulevard, Denver, Colorado.

II

This is an action to vacate, enjoin, annul, and set aside the report and order of the Interstate Commerce Commission (hereinafter referred to as the Commission), decided September 16, 1960 and the order of the Commission, decided May 17, 1961, in its Docket No. MC-72272 (Sub No. 3) entitled *J. B. Montgomery, Inc., Conversion Application*, to the extent that said report and orders provide for the issuance of a Certificate of Public Convenience and Necessity to Plaintiff in lieu of its Permit containing restrictions limiting the service authorized therein to movements from, to or between outlets or other facilities of particular classes of shippers.

[fol. 2]

III

The jurisdiction of the Court is founded upon Title 28, Sections 1336, 1398, 2284, 2321, 2323, 2324 and 2325, and

Title 5, Section 1009 of the United States Code. The United States of America is named as a defendant pursuant to Title 28, Section 2322 of the United States Code.

IV

For a number of years prior to September 21, 1961, Plaintiff conducted operations in interstate or foreign commerce as a motor contract carrier pursuant to a Permit issued by the Commission in Docket No. 72273. A copy of said Permit is attached hereto as Appendix A and made a part hereof.

V

On August 22, 1957, Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c), was amended to read as follows:

> (c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

VI

Pursuant to the aforesaid provisions of Section 212(c), the Commission, by an order dated January 3, 1958, instituted a proceeding in Docket No. MC-72273 (Sub No.

3) to determine whether the then outstanding Permit of [fol. 3] Plaintiff should be revoked and in lieu thereof a Certificate of Public Convenience and Necessity issued authorizing the transportation of the same commodities between the same points or within the same territory as authorized in the said Permit. A copy of said order is attached hereto as Appendix B and made a part hereof.

VII

Hearings were held on the proceeding in Docket No. MC-72273 (Sub No. 3) on May 19, 20 and 21, at Denver, Colo., before Examiner Robert A. Joyner. By a consolidated report and recommended order served September 26, 1958, which included the proceeding in Docket No. MC-72273, *J. B. Montgomery, Inc., Modification of Permit*, the Examiner found that Plaintiff's operations on August 22, 1957 did not, and presently do not, conform with the definition of a contract carrier as set forth in Section 208(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), that such operations are those of a common carrier and are otherwise lawful, and that Plaintiff should be issued a Certificate of Public Convenience and Necessity in lieu of its Permit. In his report, the Examiner concluded that it would be inconsistent and incompatible with Plaintiff's duty as a common carrier to have Plaintiff's authority restricted in a manner similar to the so-called "Keystone" type restriction contained in its Permit; and, the authority recommended to be granted contained no such restrictions. A copy of the report and order of Examiner Joyner is attached hereto as Appendix C and made a part hereof.

VIII

Exceptions to the report and recommended order of Examiner Joyner were filed by certain protestants to the [fol. 4] proceeding in Docket No. MC-72273 (Sub No. 3), and Plaintiff replied thereto. By a report and order decided September 16, 1960, Division I of the Commission affirmed the findings of Examiner Joyner that Plaintiff's operations did not conform with the definition of a con-

tract carrier, were those of a common carrier and otherwise lawful and that Plaintiff was entitled to a Certificate of Public Convenience and Necessity in lieu of its Permits, but concluded that the authority granted should be restricted to movements from, to or between outlets or other facilities of particular businesses of the class of shippers with whom Plaintiff had contracts as a motor contract carrier. The authority granted was so restricted. A copy of the report and order of the said report and order of Division I of the Commission is attached as Appendix D hereto and made a part hereof.

IX

Petitions for Reconsideration were filed by both Plaintiff and certain protestants in Docket No. MC-72273 (Sub No. 3), and Plaintiff and certain protestants replied to the respective petitions. By an order dated May 17, 1961, a copy of which is attached hereto as Appendix E and made a part hereof, the Commission denied all of said petitions. Plaintiff has exhausted its administrative remedies.

X

By an order dated September 21, 1961, in Docket No. MC-72273, a copy of which is attached hereto as Appendix F and made a part hereof, Division I of the Commission ordered that Docket No. MC-123639 (Sub No. 2) be assigned to the Certificate of Public Convenience and Necessity authorized to be issued to Plaintiff in Docket No. MC-72273 (Sub No. 3) and that the operating authority contained in Permit No. MC-72273 be revoked. On the same date, Plaintiff was issued a Certificate of [fol. 5] Public Convenience and Necessity in Docket No. MC-123639 (Sub No. 2), a copy of which is attached hereto as Appendix G and made a part hereof. Said Certificate of Public Convenience and Necessity contained the type of restrictions described in the said report of Division I in Docket No. MC-72273 (Sub No. 3) limiting the authority granted to movements from, to or between the outlets or other facilities of certain classes of shippers.

XI

The report and order of the Commission, decided September 16, 1960, and the order of the Commission, decided May 17, 1961, to the extent that said report and orders provide for the issuance of a Certificate of Public Convenience and Necessity to Plaintiff in lieu of its Permit containing restrictions limiting the service authorized therein to movements from, to or between outlets or other facilities of particular classes of shippers, is arbitrary, capricious, unlawful and an abuse of the Commission's discretion and authority, for the following reasons:

(1) The imposition of such restrictions exceeds the statutory authority of the Commission under Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c) or any other applicable sections of said Act, 49 U.S.C. 301-328.

(2) Such restrictions limit the commodities which Plaintiff is authorized to transport and the territory which it is authorized to serve, and Plaintiff therefore was not authorized to receive, nor did it receive, a Certificate of Public Convenience and Necessity which [fol. 6] authorizes the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in its Permit, as provided in Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c)

(3) Such restrictions are in contravention of and inconsistent with, Plaintiff's duty as a common carrier to offer its services to the general public in the transportation of the commodities, and within the territories, authorized in its Certificate of Public Convenience and Necessity.

WHEREFORE, THE PREMISES CONSIDERED, Plaintiff respectfully prays:

(1) That this, its Complaint, be filed, and that all proper process issued and be served upon defendant, United States of America and the Interstate Commerce Commission;

(2) That the Court, as soon as may be practicable after filing of this Complaint, call to its assistance for hearing and determination of the issues, two other judges, one of whom shall be a Circuit Judge as provided in Section 2284 of the Judicial Code, 28 U.S.C. § 2284;

(3) That an order be issued by this Court enjoining, annulling and setting aside the report and order of Division I of the Commission of September 16, 1961 and the order of the Commission of May 17, 1961 to the extent heretofore provided, and remanding the
[fol. 7] proceeding to the Commission with instructions that said report and orders, and the Certificate of Public Convenience and Necessity issued to Plaintiff pursuant thereto, be modified to exclude any restrictions limiting the service authorized to movements from, to or between the outlets or other facilities of shippers of certain classes.

(4) That this Court grant Plaintiff such other and further relief as may be lawful, just and proper in the premises.

/s/ Charles W. Singer
/s/ Joseph W. Morrisey, Jr.

OF COUNSEL

Charles W. Singer
33 North LaSalle Street
Chicago 2, Illinois

Holme, Roberts, More & Owen
1700 Broadway
Denver 2, Colorado

[fol. 8] APPENDIX "A" TO COMPLAINT

PERMIT

NO. MC 72273

J. B. MONTGOMERY, INC.
COZAD, NEBRASKA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 31st day of August A. D. 1943

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Permit, subject, however, to such terms, conditions, and limitations as are now or may hereafter be attached to the exercise of the privileges herein granted, to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements for the transportation of the commodities indicated and in the manner specified below;

IRREGULAR ROUTES;

Dried beans,

From points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials,* and *supplies* used in the conduct of such businesses,

From Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation or return, except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packing house products:

Such commodities are usually dealt in, or used by, meat, fruit, and vegetable packing houses,

[fol. 9] Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

Such commodities as are usually dealt in, or used by, wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

AND IT IS FURTHER ORDERED, That this permit shall be effective from the date hereof and shall remain in effect until suspended, changed, or revoked, as provided in said Act.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

[SEAL]

[fol. 10] APPENDIX "B" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the date shown on the reverse of this Order.

CONVERSION PROCEEDINGS

(Docket Number and Name Shown on Reverse)

It appearing, That a permit, or permits, described on the reverse of this order, authorizing operations in interstate or foreign commerce as a contract carrier by motor vehicle, have been issued under Part II of the Interstate Commerce Act on or before August 22, 1957, to the carrier named on the reverse of this order;

It further appearing, That there is reason to believe that the operations conducted pursuant to said permit or permits may not be those of a contract carrier as defined in Section 203(a)(15) of the Act, as amended, and may be those of a common carrier;

It is ordered, That a proceeding be, and it is hereby, instituted under Section 212(c) of the Interstate Commerce Act, upon the Commission's own initiative, to determine whether the outstanding permit or permits described on the reverse of this order, should be revoked and in lieu thereof a certificate of public convenience and necessity issued authorizing the transportation of the same commodities between the same points or within the asme territory as authorized in the permit or permits.

And it is further ordered, That the carrier named on the reverse of this order, is hereby made the respondent in this proceeding.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

[SEAL]

[fol. 11] No. MC 72273 (Sub No. 3), INSTITUTED ON January 3, 1958.

Respondent: J. B. MONTGOMERY, INC.
2430 E. 40th Avenue
Denver 5, Colorado

Respondent's attorney: Charles W. Singer
1825 Jefferson Place, N.W.
Washington 6, D. C.

Proceeding instituted under section 212(c) of the Interstate Commerce Act to determine whether the operating authority as a contract carrier presently held by respondent should be revoked and in lieu thereof a certificate of public convenience and necessity issued to operate as a *common carrier* of the same commodities between the same points or within the same territory as authorized in the following permit;

No. MC 72273, dated August 31, 1943

Dried beans, over irregular routes, from points in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials*, and *supplies* used in the conduct of such businesses, subject to a "Keystone" restriction, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr.

Such commodities, as are usually dealt in, or used by, meat, fruit and vegetable packing houses, subject to a "Keystone" restriction, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska and

Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

Such commodities as are usually dealt in, or used by, wholesale and retail department stores, subject to a "Keystone" restriction, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other points in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 12] APPENDIX "C" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Served

Sept. 26, 1958

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C., and served on all other parties in interest, within 35 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 25 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-72273 [1]

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

Decided

1. In No. MC-72273, petitioner found to be entitled to additional authority by reason of operations conducted on July 1, 1935, and continuously since that time. Issuance of amended authority approved upon compliance with certain conditions.

2. In No. MC-72273 (Sub-No. 3), applicant's operations on August 22, 1957 found to be those of a common carrier by motor vehicle.

3. Petitioner in No. MC-72273 and applicant in No. MC-72273 (Sub-No. 3) found entitled to a certificate in lieu of its outstanding permit, authorizing described operations. Issuance of a certificate in lieu of presently held permit, including additional authority granted in No. MC-72273, approved upon compliance with certain conditions, and applications in all other respects denied.

Charles W. Singer for applicant in both proceedings.

John H. Lewis, Robert D. Means, Edward G. Bazelon, Howard D. Hicks, Alvin J. Meiklejohn, Jr., and *Marion F. Jones* for protestants in both proceedings, and *W. S. Pilling* for protestant in No. MC-72273 (Sub-No. 3).

[1] This report also embraces No. MC-72273 (Sub-No. 3), J. B. Montgomery, Inc., Conversion Application.

[fol. 13] REPORT AND ORDER

RECOMMENDED BY ROBERT A. JOYNER, HEARING EXAMINER

These proceedings were heard separately, but concern somewhat related matters, and will be the subject of a single report and of separate recommended orders.

In the title proceeding, by petition dated November 20, 1957, J. B. Montgomery, Inc., of Denver, Colo., hereinafter called Montgomery, seeks waiver of Rule 101(e) of the Commission's General Rules of Practice, and reopening of the "grandfather" clause application of its predecessor in No. MC-72273 for the purpose of modifying the authority questioned therein to conform to asserted actual operations being conducted on or before July 1, 1935, and continuously thereafter, or in lieu thereof to assign the instant petition for oral hearing. Upon consideration of the record and of said petition, the Commission, division 1, by order entered March 26, 1958 granted the requested waiver of Rule 101(e), accepted the said petition for filing, and assigned same for oral hearing at a time and place to be thereafter fixed. By order entered April 11, 1958 the matter was assigned to the examiner for hearing and recommendation of an appropriate order thereon, accompanied by the reasons therefor.

In No. MC-72273 (Sub-No. 3), by order entered January 3, 1958, the Commission, division 1, on its own initiative, instituted a proceeding under section 212(c) of the Interstate Commerce Act to determine whether the outstanding permit held by Montgomery in No. MC-72273 should be revoked and in lieu thereof a certificate of public convenience and necessity issued authorizing the transportation of the same commodities between the same points or within the same territory as authorized in the permit.

In a subsequently filed application, filed February 18, 1958, Montgomery seeks a certificate of public convenience and necessity as a common carrier by motor vehicle, in interstate or foreign commerce, of the same commodi-

ties between the same points or within the same territory as authorized in permit No. MC-72273. The proceeding instituted by the Commission on its own initiative, and that reflected by the application of Montgomery, were [fol. 14] considered as a single proceeding presenting the single issue of conversion from a contract carrier authority to that of a common carrier and together were assigned No. MC-72273 (Sub-No. 3). By order entered April 10, 1958 the matter was assigned to the examiner for hearing and the recommendation of an appropriate order thereon, accompanied by the reasons therefor. Hearing in No. MC-72273 was held on May 19, 1958, and in No. MC-72273 (Sub-No. 3) on May 19, 20, and 21, 1958, at Denver. A number of motor carriers[2] appeared in opposition.

No. MC-72273.—By application in No. MC-72273, filed February 10, 1936, petitioner's predecessor, Joseph Burton Montgomery, doing business as Montgomery Transfer, of Denver, sought a permit or a certificate of public convenience and necessity under the "grandfather" clauses of sections 209(a) and 206(a) of the Interstate Commerce Act authorizing him to continue operation, in interstate or foreign commerce, as a contract or common carrier by motor vehicle of commodities generally, except livestock, coal, and milk, between Denver, and Chicago, Ill., over specified regular routes, serving numerous intermediate and off-route points. Subsequently petitioner corporation acquired the assets of the original applicant, and by notice dated February 5, 1938 the Commission, through the Bureau of Motor Carriers, advised the parties that the petitioner corporation had been substituted as applicant in No. MC-72273.

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[2] Illinois-California Express, Inc., of Denver; Interstate Motor Lines, Inc., of Salt Lake City, Utah; Denver-Chicago Trucking Company, Inc., of Denver; Ringsby Truck Lines, Inc., of Denver; Navajo Freight Lines, Inc., of Denver; Watson Bros. Transportation Co., Inc., of Omaha, Nebr.; Centennial Truck Lines, Inc., of Denver; and Buckingham Transportation, Inc., hereinafter called Illinois-California, Interstate, Denver-Chicago, Ringsby, Navajo, Watson, Centennial, and Buckingham, respectively, appeared in both proceedings, and Pacific Intermountain Express Co., hereinafter called P.I.E., appeared in No. MC-72273 (Sub-No. 3).

Following informal field investigations and the issuance of so-called compliance orders, outlining the authority proposed to be granted, a permit was issued to Montgomery in No. MC-72273 on August 31, 1943. Said permit authorized Montgomery to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements for the transportation of the commodities and in the manner as stated in appendix A hereto.

[fol. 15] Petitioner, in connection with its operations under the authority described, has been transporting rubber tires and rubber products from Denver to various points for Gates Rubber Company, hereinafter called Gates. It asserts that its predecessor was so operating on and prior to July 1, 1935, and that it and its predecessor continuously have performed such transportation since that date. Recently, in answering a questionnaire required of all contract carriers in connection with review of contract carrier operations under amended provisions of the act, the authority of petitioner to perform such transportation was brought into question. Petitioner accordingly filed the instant petition to modify and amend its permit, to clearly include authority to perform the transportation involved, by reason of operations claimed to have been conducted continuously since prior to July 1, 1935.

This proceeding is for the purpose of hearing and determining the matters contained in the above-described petition, and as the petition asserts a "grandfather" right to continue certain operations, consideration will be given herein to evidence submitted concerning such operations and any right petitioner may have under the act to a permit authorizing the continuance thereof.

The record contains a deposition of Joseph Burton Montgomery, predecessor of petitioner, taken while he was ill in Phoenix, Ariz. In this deposition the said Joseph Burton Montgomery avers that he commenced the operation of trucks, as a motor carrier, as an individual, in or about the year 1932; that the business was incorporated in or about 1938; that he was president and principal stockholder of the corporation until about 1945

when his son took over the operation; that in the period prior to July 1, 1935 he often drove one of his trucks; that he transported shipments of tires and other rubber articles from Denver to Chicago, for Gates, and some westbound service from Chicago to Denver for the same company, all under a verbal agreement; that this transportation service was performed continuously by him, and by the successor corporation under his direction and management, since prior to July 1, 1935 to the date he [fol. 16] relinquished direction and management of the corporation to his son in 1946; that he kept only a very limited bookkeeping system, and records of his operation were destroyed in 1935 or 1936.

Joseph Burton Montgomery, Jr., the son of the founder of the petitioner, assumed control of the corporation in 1946; he has available records dating back to 1942, and that records prior to that period have been destroyed; that to his personal knowledge and recollection the company has always served Gates in the transportation of rubber tires and other products, from Denver to Chicago and Omaha, Nebr., and in the return direction the transportation of supplies and equipment for Gates; that some transportation of supplies and equipment was conducted from points within about 100 miles of Chicago; that petitioner would be willing to have any modified authority limited to service for Gates; and that if pursuant to another pending application, petitioners present permit as a contract carrier is converted to a certificate as a common carrier, it would desire that modified authority sought herein be also converted.

The vice-president for traffic of Gates, employed by that company since 1912, has personal recollection of using Montgomery, Sr., for the transportation of tires, tubes, hose, mats, belting, and other types of rubber goods, from the Gates plant at Denver to Chicago and Omaha. He recalls that Montgomery, Sr., was first used in about 1932 and that Gates has continuously used petitioner and its predecessor for that type of transportation to the present date. Montgomery, Sr., and the corporation also have been used for the transportation of machinery and supplies since prior to July 1, 1935,

with origins at Niles, Mich., Hammond, Ind., and Waddams Grove and Waukegan, Ill. The sales manager of Gates, at Denver, was formerly manager of Gates' warehouse at Chicago, particularly during the period January 15, 1929, to August 1, 1936, and personally saw numerous shipments from Denver unloaded at the warehouse dock in Chicago during the period starting in 1932 until his transfer from Chicago to Denver. An insurance agent and broker commenced writing insurance for Montgomery, Sr., on January 15, 1935, covering shipments of [fol. 17] tires from Denver to Chicago for Gates. A truck dispatcher for petitioner, who drove a truck for Montgomery, Sr., before and after the critical date, recalls transporting tires from Denver to Chicago in trucks belonging to Montgomery, Sr., and shipped from the Gates plant in Denver. A stone contractor, in Denver, drove trucks for Montgomery, Sr., from 1936 to about 1942, and during that period handled shipments to and from the Gates plant in Denver. The president of Buehler Transfer Company, of Denver, operated a household goods storage and transfer business in 1932 and 1933, also drove a truck for a competitor of Montgomery, Sr., and often saw the trucks of Montgomery, Sr., loading and unloading tires at the Gates' plant in Denver. A person now with the General Iron Works Co., in Denver, was traffic manager for Armour and Company at their Denver meat packing plant from 1931 to 1944. He first knew Montgomery, Sr., in 1932, and personally assisted him in drawing up the original written contract with Gates in 1936, and was present at and assisted Montgomery, Sr., at conferences with the Commission's field representatives on the basis of which the compliance orders were issued. He recalls that Montgomery, Sr., transported tires for Gates, and was of the opinion that the authority granted in the permit embraced authority to transport tires.

Opposing carriers submitted evidence of their operating authority and by stipulation with counsel for petitioner, gave a brief indication of their operations between Denver and Chicago. They contend that petitioner has not shown that it and its predecessor conducted transportation as it alleges, since prior to the critical date, and that the permit should not be modified as sought by petitioner.

Petitioner, at the hearing, through its president, indicated that it desired modification of the present permit so as to include, in addition to authority now embraced in the permit, authority to transport (1) such commodities as are dealt in or used by manufacturers of rubber and related products, and materials, equipment, and supplies used by such manufacturers, between Denver, on the one hand, and, on the other, Chicago and Omaha; and (2) materials, equipment, and supplies used [fol. 18] by the manufacturers of rubber and rubber products, from points in Illinois within 100 miles of Chicago, to Denver.

Discussion and Conclusions.—The authority presently held by applicant embraced in the permit issued August 31, 1943, insofar as the operations involved in the instant proceeding are concerned, apparently would permit the transportation of these and probably other of the involved commodities, between the affected points, but only under contracts with those who conduct certain specified businesses. Such businesses are (1) wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automotive accessories; and (2) wholesale or retail department stores, the business of which is the sale of general merchandise. Gates is a manufacturer of tires, and other rubber goods, and the sale of such articles, either wholesale or retail, though a necessary part of its operations, is not its primary business. There is no evidence of record that the business of Gates fits into either category as described in (1) and (2) immediately above. Accordingly, the operations of petitioner in performing transportation of described commodities and between described points for Gates has been and is without authority.

Montgomery, Sr., and his son, the present president of the petitioner corporation, were of the opinion that the authority described in permit No. MC-72273 embraced authority to perform the described transportation for Gates. It is clear that Gates was included in the list of shippers named in the application filed February 10, 1936, and was named as one with whom the applicant had a verbal contract. It is also clear from all of the evi-

dence that Montgomery, Sr., on and prior to July 1, 1935, and he and his successor corporation continuously since that date, transported and have transported the described commodities between the points specified and described, for Gates as shipper and consignee. Although such transportation, since August 31, 1943, was and has been performed without authority, such operations were conducted bona fide and under a misapprehension of the scope of the authority held. Such unlawful operations [fol. 19] in the circumstances described should not be a bar to a revision of the permit to include actual operations so performed.

The evidence indicates only the movement of rubber and rubber products, principally tires, from Denver to Chicago and Omaha, and of materials, equipment and supplies from Chicago and the Chicago area to Denver. The authority granted will be so restricted.

The examiner concludes that petitioner's present authority should be modified to include authority for the operations conducted for Gates, as hereinbefore described. No revised permit should be issued, however, and the authority granted as described in the findings herein should be issued additional to the authority presently embraced in the outstanding permit, in accordance with and in the manner described in the findings in this report in No. MC-72273 (Sub-No. 3).

No. MC-72273 (Sub-No. 3).—In this proceeding Montgomery, hereinafter called applicant, seeks a certificate of public convenience and necessity in lieu of its outstanding permit as described in appendix A hereto.

The instant application was filed pursuant to amendments to provisions of part II of the act which became effective August 22, 1957. Section 212(c), an added provision, reads as follows:

> The Commission shall examine each outstanding permit and may within 180 days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate

of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third are otherwise lawful. Such certificate, so issued *shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.* (Emphasis supplied).

Section 203(a)(15) was changed to read as follows:

The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than [fol. 20] transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

On August 22, 1957 applicant had 12 effective individual continuing contracts with 12 shippers for transportation by it of property in interstate or foreign commerce. Another such contract with an additional shipper was added on March 7, 1958. It maintains a terminal and office at Denver, an office in Chicago, and operates about 8 tractors and 14 trailers, all of conventional types. Some of the trailers are equipped with mechanical refrigeration, and some of the tractors and trailers are leased from owner-operators. None of the motor vehicle equipment was assigned for a continuing period of time to the exclusive use of any shipper or person served and its transportation services were not designed to meet a distinct need of any individual customer. No shipper advertising is

displayed upon any of its equipment. Much of its transportation is in truckloads. Applicant is not under common control or management with any other motor carrier. It maintains rates which are published and filed in compliance with the requirements of the act and the rules and regulations of the Commission thereunder.

Six of its contracts, effective on August 22, 1957 and currently effective, are with meat packinghouses; two are with canning companies; three with department stores; and one with a rubber goods manufacturer. The contract added on March 7, 1958 is with a wholesale household furnishings company. Applicant actively solicits traffic from other shippers, and holds its service out to any shippers that would enter into contracts covering their transportation requirements, throughout the territory served by it and within the authority embraced in its permit. The contract with the rubber goods manufacturer, Gates, was considered by applicant to be within the authority embraced in the permit to enter into contracts with those who operate wholesale or retail department stores, the business of which is the sale of general merchandise.

[fol. 21] Some shipments transported by applicant originated at or were destined to points not authorized to be served by it and were received from or delivered by it to motor common carriers serving such points. Such traffic was moved by applicant principally between Denver and Chicago, on its own bills of lading, own freight bills, and own schedule of rates. Its traffic is unbalanced, the heavier movement being eastbound from Denver and on westbound movements from Chicago applicant often has leased its motor vehicle equipment to motor common carriers. Some equipment for eastbound movements also has been leased from motor carriers.

Applicant submitted statements of its assets and liabilities, and operating income and expenses, from which it is apparent that it is fit and able, financially, properly to conduct the described operations.

Protestants submitted copies of their certificates and described generally their authority and operations. They are motor common carriers, and are authorized to trans-

port general commodities, with exceptions, and specified commodities, over regular and irregular routes between the points and in the territory served by applicant. Their opposition is based upon the fear that their operations and revenues will be injuriously affected if applicant is granted a certificate in lieu of its outstanding permit unless restrictions hereinafter described are attached to any certificate that may be issued herein. Much of the evidence adduced by protestants' witnesses relates only to the effect granting of a certificate might have upon their traffic. Such evidence will be discussed only generally.

The issues primarily involved in this proceeding are those set forth in section 212(c) and briefly stated are, (1) whether applicant's operations, on August 22, 1957 were or were not in conformity with the revised definition of a contract carrier as stated in section 203(a)(15); (2) whether such operations are those of a common carrier; and (3) whether applicant's operations are otherwise lawful. On the evidence of record in this proceeding it is clear that applicant's operations on August 22, 1957 did not meet the criteria set forth in the amended definition of contract carrier, and did not and does not [fol. 22] now conform thereto; and that as then and presently conducted, and as intended to be conducted, they are the operations of a common carrier. Certain of the operations of applicant, although not within the authority embraced in its permit, evidently were conducted in good faith in the belief that the said operations were within its authority. Certainly there is no evidence to warrant a conclusion that unauthorized operations were a knowing and wilful violation of the act. Since the operations in question were carried on in good faith under color of right of the "grandfather" clause, and subsequent to issuance of the permit under a bona fide belief that they were within the authority, the operation without authority should not now bar the issuance of a certificate. Giving due consideration to all of the circumstances, operations of applicant properly may be considered "otherwise" lawful, within the meaning of the statute. It follows that applicant's presently held permit

should be revoked and a certificate of convenience and necessity issued in lieu thereof.

In arriving at this conclusion, due consideration has been given to the evidence adduced by protestants. However, the existence of service of presently authorized motor common carriers, and the adequacy thereof to meet shippers' needs, is not a pertinent issue here, and the only tests applicable to determine whether a certificate should be issued applicant in lieu of the permit, are those specifically set forth in amended section 212(c).

There remains to be considered what restrictions, if any, should be attached to the authority in the certificate to be issued. Protestants believe that unless the authority included in the certificate is restricted in respects hereinafter described, their traffic and revenues will be injuriously affected. They are of the opinion (1) that the present Keystone restrictions on certain of applicant's contract carrier authority should be continued as restrictions on the authority as a common carrier in the certificate when issued; (2) that the authority should be restricted against interchange with other motor common carriers; and (3) that the authority should be restricted [fol. 23] against tacking, or combining, separate grants or separate statements of authority held by applicant now or in the future, for the purpose of providing a through service. Applicant is averse to the imposition of such restrictions.

The purpose of the aforesaid restrictions generally is known and well understood, and a detailed explanation is not necessary. At the outset, however, it is clear that the statute does not specifically require that such restrictions be placed in the certificate. It is entirely within the discretion of the Commission whether the authority shall be restricted, unless some requirement to do so reasonably can be read into the wording of the statute.

Amended section 212(c) provides that the certificates issued under the authority of its provisions:

> . . . shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

The present permit carries the Keystone restrictions against certain of the authority included therein, but not as to all of the authority. Restrictions against interchange and tacking do not appear in the permit, but are inherent in applicant's status as an authorized contract carrier. The pertinent provisions of amended section 212(c) requiring the authorization of "the same commodities between the same points or within the same territory" cannot reasonably be interpreted as requiring that exactly the same restrictions imposed against the commodity or territory authority as a contract carrier are to be applied to the commodity or territory authority as a common carrier. It is required that the *same commodities* be authorized, the *same points* between which service may be given, or the *same territory* in which it may operate. The Keystone restriction, appearing in connection with certain commodity authority in applicant's permit, insofar as it operates to restrict the type of persons with whom the carrier may enter into contracts, is not properly applicable to the common carrier authority. When the carrier ceases to be a contract carrier and is authorized to operate as a common carrier, the reason [fol. 24] for such Keystone restriction vanishes. As a common carrier, it offers its services, and must make its services available to all members of the shipping public, within the scope of its authority. It would be inconsistent and incompatible with its duty as a common carrier, to be restricted in the offer of its services in such a manner.

As to the suggested restrictions upon interchange of traffic with other motor carrier, and upon the tacking of authorities to provide through service, it is recognized that restrictions of the nature suggested have been placed from time to time upon common carrier authority. Such restrictions, however, generally are not favored, as limiting and impeding the exercise of common carrier duty and responsibilities, and are imposed only upon a showing of compelling reasons therefor. No compelling reasons have been shown for the imposition of such restrictions upon the common carrier authority to be granted applicant. That applicant as a common carrier may inter-

change traffic with other common carriers, and may tack its authorities to provide through services, is a natural concomitant of common carrier authority. The ability to provide such services, to some degree is an extension of the authority held under the permit, but such additional authority necessarily stems from the inherent characteristics and duties of common carriage rather than from the conversion itself. The mere fact that, to some extent, existing common carriers may be faced with additional competition because of the conversion is not here pertinent or controlling, nor a compelling reason for imposting such limitations upon the common carrier authority of applicant.

In No. MC-72273, the conclusion reached herein is that petitioner is entitled to certain described contract carrier authority, additional to that presently embraced in permit No. MC-72273. Usually, upon the grant of such authority becoming effective, an amended permit would be issued. However, in view of the conclusion in No. MC-72273 (Sub-No. 3) that the outstanding permit should be revoked and a certificate should be issued in lieu thereof, it would appear to be a superfluous act to issue an amended permit and then immediately to revoke it and issue a certificate. A more reasonable course, and one [fol. 25] obviously in conformity with all requirements, in these proceedings is to proceed, in No. MC-72273 (Sub-No. 3), to the revocation of the present permit, and to the issuance of a certificate in lieu thereof which certificate should include the additional authority herein granted in No. MC-72273.

Findings.—In No. MC-72273, the examiner finds that on July 1, 1935, Joseph Burton Montgomery doing business as Montgomery Transfer, was, and that he and his successor continuously since to August 22, 1957 have been engaged in bona fide operation in interstate or foreign commerce as a contract carrier by motor vehicle, over irregular routes, of (1) such commodities as are usually dealt in by manufacturers of rubber and rubber products, from Denver, Colo., to Chicago, Ill., and Omaha, Nebr., and (2) materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago,

and points in Illinois within 100 miles of Chicago, to Denver; that petitioner herein, since August 22, 1957, has been and presently is engaged in operation as a motor carrier in the transportation of the commodities and between the points above described; that petitioner herein is entitled to continue such operations under appropriate authority in addition to the authority presently embraced in permit No. MC-72273, and that the petition herein dated November 20, 1957 to the extent shown should be granted.

In No. MC-72273 (Sub-No. 3), the examiner finds that applicant's operations on August 22, 1957 did not, and presently do not, conform with the definition of a contract carrier as set forth in section 203(a)(15), as amended; that such operations are those of a common carrier by motor vehicle, and are otherwise lawful.

The examiner further finds, in No. MC-72273 (Sub-No. 3), that an appropriate certificate in lieu of the permit now held by applicant, and embracing authority to which applicant herein is found entitled in No. MC-72273, should be issued authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities, between the points, and in [fol. 26] the manner as described in appendix B hereto; and that applicant's outstanding permit in No. MC-72273 shall coincidentally with the issuance of the foregoing described certificate, be revoked.

In view of the findings herein, it is recommended that the appended orders be entered.

By Robert A. Joyner, Hearing Examiner.

(Signature) Robert A. Joyner

[fol. 27]

APPENDIX A TO APPENDIX C.

Authority embraced in Permit No. MC-72273

Over Irregular Routes:

1. *Dried beans*, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

2. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:

   Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials*, and *supplies* used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.

3. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packinghouse products:

   Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between

Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

4. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

Such commodities as are usually dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 28]

APPENDIX B TO APPENDIX C

Authority Granted:

Over Irregular Routes

1. *Dried beans*, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

2. *Such commodities* as are dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment*, *materials*, and *supplies* used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Merrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.

3. *Such commodities* as are dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

4. *Such commodities* as are dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east

of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

5. *Such commodities* as are dealt in by manufacturers of rubber and rubber products, from Denver, Colo., to Chicago, Ill., and Omaha, Nebr.

6. *Materials, equipment, and supplies* used by manufacturers of rubber and rubber products, from Chicago, Ill., and points in Illinois within 100 miles of Chicago, to Denver, Colo.

[fol. 29]

ATTACHMENT TO APPENDIX "C"

Recommended by Robert A. Joyner
Hearing Examiner

(Signature) Robert A. Joyner

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A.D. 1958.

No. MC-72273

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

It appearing, That on February 28, 1938, the Commission, division 5, entered its order granting certain authority in No. MC-72273, that such order was supplemented by order entered February 17, 1941, and that the application therein was denied in all other respects;

It further appearing, That pursuant to the said orders of February 28, 1938 and February 17, 1941, on August 31, 1943 a permit was issued to J. B. Montgomery, Inc., authorizing certain operations as a contract carrier by motor vehicle;

It further appearing, That upon consideration of the record, and of petition of J. B. Montgomery, Inc., for reopening of "Grandfather" clause application and modification of permit, the Commission, division 1, by order entered March 26, 1958 assigned such petition for hearing; and that by order entered April 11, 1958 the said proceeding was referred to the examiner for hearing and for recommendation of an appropriate order thereon, accompanied by the reasons therefor;

And it further appearing, That investigation of the matters and things involved in the above-entitled proceeding has been made, said matters contained in said petition upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the application in No. MC-72273 be, and it is hereby, reopened; that the said orders entered February 28, 1938 and February 17, 1941, insofar as they denied the application, be, and they are hereby, vacated and set aside; that appropriate additional authority be issued in No. MC-72273 in accordance with the findings in said report; and that such authority in addition to the authority now held in permit No. MC-72273 be embraced in a certificate authorized in said report herein to be issued in No. MC-72273 (Sub-No. 3).

And it is further ordered, That the application in No. MC-72273 in all other respects be and it is hereby, denied.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary

[SEAL]

[fol. 30] Recommended By Robert A. Joyner,
Hearing Examiner

(Signature) Robert A. Joyner

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A.D. 1958.

No. MC-72273 (Sub-No. 3)

J. B. MONTGOMERY, INC., CONVERSION APPLICATION

It appearing, That by order entered January 3, 1958, in No. MC-72273 (Sub-No. 3), the Commission, division 1 instituted an investigation on the Commission's own motion under the provisions of section 212(c) of the Interstate Commerce Act to determine whether the permit No. MC-72273 as a contract carrier held by the J. B. Montgomery, Inc., should be revoked and a certificate of public convenience and necessity as a common carrier be issued in lieu thereof; and that on February 18, 1958 the said J. B. Montgomery, Inc., filed an application under section 212(c) of the act seeking such conversion from contract carrier to common carrier authority; and that by order entered April 10, 1958 the said proceedings were referred to the examiner for hearing and for recommendation of an appropriate order thereon, accompanied by the reasons therefor;

It further appearing, That investigation of the matters and things involved in these proceedings have been made, said proceedings upon due notice having been heard by the examiner, who has made and filed his report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceedings having been duly submitted:

It is ordered, That upon full compliance with the requirements of sections 215, 217, and 221(c) of the act, and with our rules and regulations thereunder, a certificate be issued to J. B. Montgomery, Inc., authorizing

operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities and in the manner described in the findings in the said report.

It is further ordered, That, except to the extent granted, the authority sought in the instant proceeding be, and it is hereby, denied.

It is further ordered, That the proceeding herein instituted on the Commission's own motion be, and it is hereby, discontinued.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

[SEAL]

[fol. 31]

APPENDIX "D" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-72273 [1]

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

Date of Service—September 26, 1960

Decided September 16, 1960

1. In No. MC-72273, petitioner, as successor in interest, found entitled to additional authority by reason of predecessor's operations conducted on July 1, 1935, and continuously since that time.

2. In No. MC-72273 (Sub-No. 3), operations of applicant found to be those of a common carrier by motor vehicle, and applicant found to be entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, of the commodities, and from, to, or between the points or territories authorized by its presently-held permit. Issuance of a certificate in lieu of presently-held permit approved upon compliance by applicant with certain conditions, and application in all other respects denied. Proceeding instituted herein, on our own motion, discontinued.

Charles W. Singer for J. B. Montgomery, Inc., in both proceedings.

John H. Lewis, Robert D. Means, Edward G. Bazelon, Howard D. Hicks, Alvin J. Meiklejohn, Jr., Marion F. Jones, and *Truman A. Stockton, Jr.*, for protestants in both proceedings.

W. S. Pilling for protestant in No. MC-72273 (Sub-No. 3).

[1] This report also embraces No. MC-72273 (Sub-No. 3), J. B. Montgomery, Inc., Conversion Application.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND HERRING

BY DIVISION 1:

These proceedings were heard separately, but were the subject of a single report and recommended order of an examiner. They concern related matters, and will be disposed of here in a single report. Exceptions to the orders recommended by the examiner in both proceedings were filed by certain protestants, and J. B. Montgomery, Inc., hereafter called Montgomery, petitioner in the title proceeding and applicant in the sub-titled proceeding; replied. Our conclusions differ somewhat from those recommended. [fol. 32] In No. MC-72273, hereafter called the "grandfather" proceeding, by petition filed November 20, 1957, Montgomery, of Denver, Colo., seeks to have the proceeding in which its permit, No. MC-72273, which is reproduced in Appendix A hereto, was issued to its predecessor in interest, reopened and its permit modified to authorize the transportation which, it is claimed, it and its predecessor have performed for the Gates Rubber Company, hereinafter called Gates, of Denver, Colo., prior to and since July 1, 1935. At the hearing Montgomery, through its president, indicated that it desired modification of the permit so as to include, in addition to the authority now embraced in its permit, the authority set forth in Appendix B hereto. Numerous motor carriers[2] oppose the petition.

In No. MC-72272 (Sub-No. 3), hereafter called the conversion proceeding, by order of January 3, 1958, Division 1, upon its own initiative, instituted a proceeding under section 212(c) of the Interstate Commerce Act to

[2] Illinois-California Express, Inc., Interstate Motor Lines, Inc., Denver-Chicago Trucking Company, Inc., Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., Watson Bros. Transportation Co., Inc., Centennial Truck Lines, Inc., and Buckingham Transportation, Inc., in its own behalf and as operator of Des Moines Transportation, Inc., hereinafter called I.C.X., Interstate, Denver-Chicago, Ringsby, Navajo, Watson, Centennial, and Buckingham, respectively.

determine whether Montgomery's outstanding permit, authorizing the operations described in Appendix A, should be revoked and a certificate of public convenience and necessity issued in lieu thereof. The order instituting the proceeding names Montgomery as respondent. Thereafter, on February 18, 1958, Montgomery also filed an applica- [fol. 33] tion for conversion under section 212(c). We will dispose of the conversion matter on the basis of the application filed by Montgomery. All of the protestants in the "grandfather" proceeding and Pacific Intermountain Express Co., hereinafter called P.I.E., oppose the conversion.

In the "grandfather" proceeding the examiner recommended that permit No. MC-72273 should be modified to include the transportation, over irregular routes of (1) such commodities as are usually dealt in by manufacturers of rubber and rubber products, from Denver to Chicago, Ill., and Omaha, Nebr., and (2) materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago, and points in Illinois within 100 miles of Chicago, to Denver. Watson, on separate exceptions and I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo, on joint exceptions, contend generally that the evidence of Montgomery's witnesses, unsupported by written documents, is not the best evidence; that there were some inconsistencies in the testimony; and that Montgomery has delayed for an unnecessarily long time in taking any action to modify its authority. I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo also contend that the examiner erred in refusing to receive certain letters into evidence; and if any authority is granted it should only authorize service between Denver and Chicago restricted to pickup or delivery at the site of the Gates plant at Denver. In reply Montgomery contends that the evidence presented on its behalf is reliable and consistent, and that the findings of the examiner are fully supported by the evidence.

In the conversion proceeding the examiner found that Montgomery's operations on August 22, 1957, did not [fol. 34] conform to the definition of a contract carrier as set forth in section 203(a)(15), as amended; and that such operations were those of a common carrier by motor

vehicle and were otherwise lawful. He recommended that an appropriate certificate, in lieu of the permit now held by Montgomery, be issued with the so-called "Keystone" restrictions omitted therefrom. On exceptions all those opposing the conversion, with the exception of Centennial, contend, collectively or individually, that the examiner erred (1) in failing to impose restrictions against interchange and tacking, (2) in eliminating existing "Keystone" restrictions, and (3) in failing to consider the issue of dormancy. In addition certain protestants contend that Montgomery did not meet the burden of proving that it was a common carrier; and that the operations of Montgomery and its predecessor were not "otherwise lawful" as is required by section 212(c). Montgomery replies that its operations do not conform to the definition of a contract carrier, are those of a common carrier, and are otherwise lawful; and that no restrictions should be imposed in the certificate to be issued.

The evidence adduced, the examiner's recommendations, the exceptions, and the replies thereto have been considered. We find that the material facts are correctly stated in the examiner's report; and we adopt such statement, as hereinafter supplemented, as our own.

THE "GRANDFATHER" PROCEEDING

The considered permit stems from a "grandfather" application filed on February 10, 1936, by Montgomery's predecessor, Joseph Burton Montgomery, doing business as Montgomery Transfer. Following informal field investigations and the issuance of so-called compliance or- [fol. 35] ders, a permit was issued to petitioner on August 31, 1943, authorizing it to conduct the operations which are described in Appendix A hereto. Montgomery claims that its predecessor also transported, during the "grandfather" period, the commodities, in the manner, and to and from the points described in Appendix B, and that its predecessor and it have been so operating since that time under the impression that such movements were authorized by the permit in issue.

The record contains a deposition of the predecessor, and oral testimony of Montgomery's president, two witnesses

representing Gates, an insurance broker, two former drivers of Montgomery and its predecessor, a driver who drove for a competitor of the predecessor, and a former traffic manager of one of the predecessor's shippers.

The predecessor commenced motor-carrier operations in 1932, and when the business was incorporated on or about 1938 he became president and principal stockholder until 1945 when he retired. He recalls transporting prior to July 1, 1935, shipments of tires and other rubber goods from Denver to Chicago for Gates, and some westbound transportation of general supplies used in the manufacturing of tires from Chicago to Denver for the same company under an oral agreement. He often drove one of his own trucks. From July 1, 1935, until his retirement he continued to perform services for Gates. He kept a limited bookkeeping system, and the records of his operation have been destroyed. Montgomery's president, son of the predecessor, has been associated with it since 1946, and has been president since 1949. He testi- [fol. 36] fied that, to his personal knowledge and recollection, Montgomery has provided transportation for Gates since 1946.

The vice-president for traffic of Gates, employed by Gates since 1912, has used the predecessor's and Montgomery's service for the transportation of tires and other rubber goods from the Gates plant at Denver to Chicago and Omaha from before 1935 to the present time. Also both Montgomery and its predecessor have transported machinery and supplies for Gates since prior to 1935, from Chicago and from unspecified points within 100 miles of Chicago to Denver. The sales manager of Gates' warehouse at Chicago from 1929 to August 1936, knew the predecessor in this period and remembers Montgomery's trucks performing a transportation service inbound to the Chicago warehouse from Denver. One former truckdriver of the predecessor recollects transporting shipments for Gates in 1937 from Denver and also loading tires at the Gates plant, and another truckdriver, who drove for Montgomery and its predecessor from 1936 to 1942, recalls handling loads for Gates continuously during that period. A former competitor of predecessor

in 1932 and 1933 often saw the trucks of predecessor at the Gates plant in Denver. An insurance agent commenced writing insurance for predecessor on January 15, 1935, covering shipments of tires from Denver to Chicago. A former traffic manager for Armour and Company at its Denver plant from 1931 to 1944 first knew the predecessor in 1932, personally assisted him in drawing up the original written contract with Gates in 1936, and recalls that predecessor transported tires for Gates.

[fol. 37] We are of the opinion, despite the fact that much of the evidence concerns incidents occurring over 20 years ago, that the record is convincing that Montgomery or its predecessor were engaged in the operations as set forth in paragraph 5 of Appendix C on and prior to July 1, 1935, and have been so engaged continuously since. We do not agree that in the circumstances here present the oral testimony pertaining to the considered operations is insufficient to warrant the relief sought. Although the records pertaining to the services conducted on and before the effective date have been destroyed, we cannot see any compelling reason why the predecessor should have retained them. We believe that the nine witnesses testifying on behalf of petitioner gave a total picture of petitioner's operations before, on, and since July 1, 1935, and we conclude that they were qualified to testify concerning the facts with respect to the considered operations. See *Beatty Motor Express, Inc.—Modification of Permit*, 71 M.C.C. 307. Some of the protestants also argue that the examiner erred in not allowing certain letters to be admitted into evidence. However, protestants' petition to admit these letters was denied by order of July 28, 1958, and we see no reason for granting the relief here sought and there denied.

One other matter requires a brief comment. Some of the protestants argue that the authority granted should be limited to service between Denver and Chicago restricted to pick up or delivery at the site of the Gates plant at Denver. However, we believe that the evidence is convincing that other points beside Denver and Chicago were served by Montgomery and its predecessor. We [fol. 38] also see no justification for restricting the serv-

ices concerned from and to the Gates plant at Denver. We believe that the modified authority would not have been so restricted if included in the original permit issued pursuant to the determination of the "grandfather" application, and see no compelling reason to do so now. We therefore conclude that Montgomery's present authority should be modified to the extent recommended by the examiner, to include the authority as indicated in paragraph 5 of appendix C.

THE CONVERSION PROCEEDING

Montgomery's operations between July 1 and August 31, 1957, were substantially as authorized under its outstanding permit; during this period it had effective continuing contracts with 12 different shippers. The contract with Gates was considered by Montgomery to be within its authority to perform service under contracts with persons who operate wholesale or retail department stores. Montgomery operates numerous units of equipment, none of which is assigned for the exclusive use of any shipper. Its services do not appear designed to meet the distinct need of any particular customer, and subject only to shipper acceptance of its charges, its service is available to any member of the shipping public having shipments moving within the scope of its authority. Certain of Montgomery's authorities, as indicated in Appendix A, contain "Keystone" restrictions limiting service to shippers of a certain class.

We are of the opinion that, testing applicant's operations by the amended definition of a contract carrier as set forth in section 203(a)(15), it fairly appears that [fol. 39] they do not meet the criteria contained in the amended definition and do not conform thereto. We do not agree with some of the protestants who argue that conversion should not be authorized, because applicant did not prove "operations" on August 22, 1957. "Operations" clearly contemplates the over-all business of, and service rendered by the contract carrier on the critical date, and not the mere physical operations performed on that single day. In light of the facts of record, including the nature of the commodities described in applicant's permit, its

holding out to the public generally, its method of operation, and the number of persons it serves, it is clear that its operations were, on August 22, 1957, that of a common and not a contract carrier.

There remains for consideration the questions whether there should be conversion of portions of applicant's operating authority that are dormant; whether restrictions against interchange and tacking should be imposed; and whether the certificate issued herein should eliminate so-called "Keystone" restrictions. In *T. T. Brooks Trucking Co., Inc., Conversion Application*, 81 M.C.C. 561, the Commission concluded that where only portions of a carrier's operating authority are dormant, the determination of the carrier's status should be made from a consideration of its overall activities and conversion authorized where such operations are found to be those of a common carrier. Since Montgomery's overall operations actually conducted on August 22, 1957, entitle it to conversion, the certificate issued herein will authorize the performance of the transportation service authorized by the permit outstanding on that date.

[fol. 40] In the *Brooks* case it was also concluded that restrictions against interchange of traffic should not be imposed in certificates granted to converted carriers in section 212(c) proceedings. The right of interchange was there held to be a privilege stemming from and incidental to a converted carrier's new common carrier status and not a result of a restatement of the operating authority previously held as a contract carrier. Accordingly, no restriction against interchange of traffic with other common carriers will be imposed in the grant of authority herein. It was found, however, in the *Brooks* case that where the possibility of tacking separately stated operating rights exists, restrictions against such joinder should be imposed in all certificates issued pursuant to section 212(c) proceedings. Under the circumstances, and in view of tacking possibilities in Montgomery's permit, a restriction against such joinder will be imposed in the grant of authority herein.

The *Brooks* case also held that in instances where "Keystone" restrictions appear in the permits of carriers who

are to be converted, the certificates to be issued in lieu thereof should contain terms which will continue, to some extent, at least, the effectiveness of such restrictions. It is considered inappropriate, however, to confine Montgomery's service to establishments of "persons" who operate particular business. Rather, its service will be restricted to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract as indicated in Appendix C herein. This will enable it to furnish sub-
[fol. 41] stantially the same service as a common carrier as it is now authorized to provide as a contract carrier thereby insuring substantial parity between the permit and certificate authority.

One other matter deserves our attention. Certain protestants argue on exceptions that since Montgomery and its predecessor have transported products for Gates, without specific authority, that this precludes a finding that its operations have been "otherwise lawful" as is required for conversion by section 212(c). In view of our finding herein in the "grandfather" proceeding that Montgomery is entitled to authority to conduct such operations under the "grandfather" provisions of the Transportation Act of 1935, a finding that such operations conducted since that time were lawful appears to be justified.

FINDINGS

In No. MC-72273, we find that on and continuously since July 1, 1935, Joseph Burton Montgomery, doing business as Montgomery Transfer, was, and that he and his successor J. B. Montgomery, Inc., have been engaged continuously since, in bona fide operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, of the commodities and from and to the points, and in the manner set out in paragraph 5, of Appendix C hereto; that by reason thereof J. B. Montgomery, Inc., is entitled to an amended permit authorizing continuance of such operations in addition to those heretofore authorized; that in light of the finding herein in No. MC-72273 (Sub-No. 3), that J. B. Montgomery, Inc., is entitled to a certificate of public convenience and necessity

in lieu of its outstanding permit, and the provision there-
[fol. 42] in for the issuance of such a certificate, no amended permit need be issued; and that in all other respects the application should be denied.

In No. 72273 (Sub-No. 3), we find that the operations of applicant on August 22, 1957, did not and presently do not conform with the definition of a contract carrier set forth in section 203(a)(15) of the Interstate Commerce Act; that such operations are those of a common carrier by motor vehicle and are otherwise lawful; that by reason thereof applicant is entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, in interstate or foreign commerce, of the commodities and from and to the points or territories authorized in its presently-held permit, as modified herein in No. MC-72273, as set forth in Appendix C hereto, provided, however, that the certificate issued to applicant shall be subject to the condition that the separate authorities contained therein shall not be tacked or joined, directly or indirectly, for the purpose of performing any through service; that an appropriate certificate authorizing such operations should be granted concurrently with the revocation of the permit now held by applicant as described in Appendix A hereto; and that, except to the extent granted herein, the authority sought in this conversion proceeding should be denied.

Upon compliance by applicant with the requirements of section 215, 217, and 221(c) of the act and with our rules and regulations thereunder, an appropriate certificate will be issued.

[fol. 43] An order will be entered denying the authority sought except to the extent granted herein.

COMMISSIONER MURPHY, dissenting in part:

I would deny the petition for modification in the "grandfather" proceeding and limit the conversion to the operations embraced in applicant's presently held permit. While the general oral testimony indicates rather convincingly that petitioner has performed some transportation for the manufacturer of rubber products, it is significant that although petitioner indicated that records

were available back to 1942, no documentary evidence in respect of any specific shipments handled for this shipper at anytime since the "grandfather" date was submitted. In my opinion, the unsupported general allegations clearly are insufficient to support a finding of continuous bona fide transportation for about 25 years of the additional commodities from and to the points and areas set forth in Appendix B of the report. Moreover, I consider petitioner's contention that it has been transporting rubber products and other items for Gates under the belief that such service was embraced in its authority to transport "such commodities as are usually dealt in, or used by, wholesale and retail department stores," to be completely untenable.

[fol. 44]

APPENDIX A TO APPENDIX "D"

Authority embraced in Permit No. MC-72273, dated August 31, 1943.

Over Irregular Routes:

1. *Dried beans*, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

2. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:

   Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials*, and *supplies* used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.

3. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packinghouse products:

   Such commodities as are usually dealt in, or used by meat, fruit, and vegetable packinghouses, between

Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 45] 4. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

Such commodities as are usually dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 46]

APPENDIX B TO APPENDIX "D"

Additional grandfather rights claimed by applicant.

Irregular routes:

Such commodities as are dealt in or used by manufacturers of rubber and related products, and materials, equipment, and supplies used by said manufacturers,

Between Denver, Colo., on the one hand, and, on the other, Chicago, Ill., and Omaha, Nebr.

Materials, equipment, and supplies used by the manufacturers of rubber and rubber products.

From points in Illinois within 100 miles of Chicago to Denver.

[fol. 47]

APPENDIX C TO APPENDIX "D"

Certificate to be issued to J. B. Montgomery, Inc.

Irregular Routes:

1. *Dried beans*, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

2. *Such commodities* as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials*, and *supplies* used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morill, and North Platte, Nebr., restricted to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments.

3. *Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products.

4. *Such commodities* as are usually dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line; restricted to shipments moving, from, to, or between wholesale or retail department stores.

[fol. 48] 5. *Such commodities* as are usually dealt in by manufacturers of rubber and rubber products, from Denver, Colo., to Chicago, Ill., and Omaha, Nebr., and

Materials, equipment, and *supplies* used by manufacturers of rubber and rubber products, from Chicago, and points in Illinois within 100 miles of Chicago to Denver.

[fol. 49]

ATTACHMENT TO APPENDIX "D"

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 16th day of September, A. D. 1960.

No. MC-72273

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

No. MC-72273 (Sub-No. 3)

J. B. MONTGOMERY, INC., CONVERSION APPLICATION

It appearing, That on February 28, 1938, the Commission, division 5, entered its order granting certain authority in No. MC-72273, and that such order was supplemented by order entered February 17, 1941.

It further appearing, That pursuant to the said orders of February 28, 1938 and February 17, 1941, on August

31, 1943, a permit was issued in No. MC-72273 authorizing certain operations as a contract carrier by motor vehicle;

It further appearing, That upon consideration of the record, in No. MC-72273 and of a petition of J. B. Montgomery, Inc., for reopening that proceeding and for modification of its permit, the Commission, division 1, by order entered March 26, 1958, assigned such petition for hearing;

And it further appearing, That investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the proceeding in No. MC-72273 be, and it is hereby, reopened; that the said orders entered February 28, 1938 and February 17, 1941, be, and they are hereby, vacated and set aside; that appropriate additional authority be granted in No. MC-72273 in accordance with the findings in said report; and that such authority in addition to the authority now held in permit No. MC-72273 be embraced in a certificate authorized in said report herein to be issued in No. MC-72273 (Sub-No. 3), and that in all other respects the said application in No. MC-72273 be, and it is hereby, denied.

And it is further ordered, That the application in No. MC-72273 (Sub-No. 3), except to the extent granted in said report, be, and it is hereby, denied; and that the proceeding instituted herein on our own motion under section 212(c) of the Interstate Commerce Act, be, and it is hereby, discontinued.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary

[SEAL]

[fol. 50]

APPENDIX "E" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 17th day of May , A.D. 1961.

No. MC-72273

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

No. MC-72273 (Sub-No. 3).

J. B. MONTGOMERY, INC., CONVERSION APPLICATION
(Denver, Colo.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed October 26, 1960, for reconsideration in No. MC-72273 (Sub-No. 3);

(2) Petition of Watson Bros. Transportation Co., Inc., protestant dated October 25, 1960, for reconsideration;

(3) Joint petition of Illinois-California Express, Inc., Denver-Chicago Trucking Company, Inc., Interstate Motor Lines, Inc., Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., and Centennial Truck Lines, Inc., protestants, dated October 24, 1960, for reconsideration;

(4) Reply to petition in (1) above, by Watson Bros. Transportation Co., Inc., protestant, dated November 3, 1960;

(5) Reply to petition in (1) above, by Pacific Intermountain Express, Co., protestant, filed November 14, 1960;

(6) Reply to petitions in (2) and (3) above, by applicant, filed November 25, 1960;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law.

By the Commission.

HAROLD D. MCCOY,
Secretary

[SEAL]

[fol. 51]

APPENDIX "F" TO COMPLAINT

ORDER

RV-150-C

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 21st day of September, A. D., 1961

No. MC 72273

J. B. MONTGOMERY, INC.,
DENVER, COLORADO

REVOCATION OF OPERATING AUTHORITY ISSUED AUGUST 31, 1943, AS MODIFIED BY ORDER ENTERED SEPTEMBER 16, 1960 (PROPERTY)

It appearing, That operating authority was issued to the above-named carrier on the date specified above authorizing operations in interstate or foreign commerce as a motor carrier under the Interstate Commerce Act;

It further appearing, That an order in No. MC 72273 Sub 3, decided September 16, 1960, authorized the issuance of a certificate to the above-named carrier, and No. MC 123639 Sub 2 has been assigned thereto; that said order provided that carrier's oustanding Permit No. MC 72273 shall be revoked coincidentally with the issuance of the authorized certificate; therefore,

It is ordered, That the operating authority in Docket No. MC 72273 be, and it is hereby, revoked.

By the Commission, Division 1.

HAROLD D. MCCOY,
Secretary

[SEAL]

SERVICE DATE
SEPTEMBER 21, 1961

[fol. 52]

APPENDIX "G" TO COMPLAINT

SERVICE DATE
SEPTEMBER 21, 1961

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY C-15.3

No. MC 123639 SUB 2*

J. B. MONTGOMERY, INC.,
DENVER, COLORADO

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 21st day of September, A.D., 1961

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pur-

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* Proceeding was instituted under Section 212(c) of the Act, in No. MC 72273 Sub 3 for conversion of respondent's contract carrier authority to common carrier authority. Pursuant to the report of the Commission decided September 16, 1960, common carrier operations were authorized, and No. Mc123639 Sub 2 has been assigned thereto.

suant of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Dried beans,

From points in that part of Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points in that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

Such commodities as are usually dealt in by whole or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials and supplies* used in the conduct of such businesses,

From Chicago, Illinois, to Sterling, Fort Morgan, Yuma, Loveland and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr. with
[fol. 53] no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments.

Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products,

Such commodities, as are usually dealt in, or used by, wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving, from, to, or between wholesale or retail department stores.

Such commodities as are usually dealt in by manufacturers of rubber and rubber products,

From Denver, Colo., to Chicago, Ill., and Omaha, Nebr., with no transportation for compensation on return except as otherwise authorized.

Materials, equipment and supplies used by manufacturers of rubber and rubber products,

From Chicago, Ill., and points in Illinois within 100 miles of Chicago, Ill., to Denver, Colo., with

no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The separate authorities contained herein shall not be tacked or joined, directly or indirectly, for the purpose of performing any through service.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

[SEAL]

[fol. 54] • • •

[fol. 55]

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLORADO

Civil Action No. 7384

[Title Omitted]

[File Endorsement Omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—
Filed March 19, 1962

Now come the United States of America and the Interstate Commerce Commission, defendants in the above-styled action, and for answer to the complaint therein filed:

I.

Admit the allegations of paragraphs I to III, inclusive.

II.

Admit the allegations of paragraph IV, except that defendants deny that Plaintiffs' operations subsequent to August 22, 1957, have been those of a contract carrier by motor vehicle. Defendants further allege that, by virtue of the 1957 amendment to Section 203(a)(15) of the Interstate Commerce Act, Plaintiffs' operations since August 22, 1957, have been those of a common carrier by motor vehicle.

III.

Admit the allegations of paragraph V.

[fol. 56]

IV.

Admit the allegations of paragraph VI, except that defendants allege that, in addition to the proceeding instituted by the Commission under Section 212(c), an application for conversion was filed by the plaintiffs themselves on February 18, 1958, pursuant to section 212(c), and the case was decided by the Commission on the basis of the application filed by the plaintiffs.

V.

Admit the allegations of paragraphs VII to X, inclusive.

VI.

Deny the allegations of paragraph XI, and deny that the report and orders of the Commission are invalid for any of the reasons therein alleged, or for any reason whatsoever.

VII.

Except as expressly admitted herein, each and every allegation of the complaint is denied.

WHEREFORE, having fully answered, the defendants pray that the complaint be dismissed and the relief therein prayed for be denied.

/s/ John H. D. Wigger
Attorney
Department of Justice
Washington 25, D. C.

LEE LOEVINGER
Assistant Attorney General
LAWRENCE M. HENRY
United States Attorney
Denver, Colorado
Attorneys for the United States of America

/s/ Betty Jo Christian
Attorney
Interstate Commerce Commission
Washington 25, D. C.

ROBERT W. GINNANE
General Counsel

Attorneys for the Interstate Commerce Commission

[fol. 57] [CERTIFICATE OF SERVICE Omitted in Printing]

[fols. 58-61] * * *

[fol. 62]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 7384

[Title Omitted]

[File Endorsement Omitted]

ORDER SUBSTITUTING PARTY PLAINTIFF—May 21, 1962

It appearing pursuant to the stipulation of the parties that J. B. Montgomery, Inc., an Iowa corporation, has succeeded to the interest in the operating rights in issue herein issued by the Interstate Commerce Commission to J. B. Montgomery, Inc., a Nebraska corporation, Plaintiff, and the parties having agreed to a substitution of Plaintiff,

IT IS ORDERED that J. B. Montgomery, Inc., an Iowa corporation, be substituted as plaintiff.

DATED at Denver, Colorado, this 21st day of May, 1962.

BY THE COURT:

/s/ Jean S. Breitenstein, Circuit Judge
United States Court of Appeals
Tenth Circuit

/s/ Alfred A. Arraj, Chief Judge
United States District Court

/s/ Hatfield Chilson, Judge
United States District Court

[fol. 63] • • •

[fol. 64]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

[File Endorsement Omitted]

Charles W. Singer, 33 North LaSalle Street, Chicago 2, Illinois, and Joseph W. Morrisey, Jr., of the firm of Holme, Roberts, More & Owen, 1700 Broadway, Denver 2 Colorado, for Plaintiff; Lee Loevinger, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., and Lawrence M. Henry, United States Attorney, Denver, Colorado, for the Defendant United States of America; Robert W. Ginnane, General Counsel, and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D. C., for the Defendant Interstate Commerce Commission.

Before BREITENSTEIN, Circuit Judge, ARRAJ and CHILSON, District Judges.

CHILSON, District Judge.

[fol. 65] MEMORANDUM OPINION AND ORDER—
July 6, 1962

This is an appeal from a decision of the Interstate Commerce Commission, herein referred to as the "Commission."

After the filing of the complaint herein, J. B. Montgomery, Inc., an Iowa corporation, succeeded to the in-

terests of the original plaintiff, J. B. Montgomery, Inc., a Nebraska corporation, and the former has been substituted as plaintiff herein. Both will be referred to herein as "Montgomery."

The controversy centers around certain restrictions placed by the Commission in a certificate of public convenience and necessity issued to Montgomery in 1961.

The events leading to the dispute are as follows:

Montgomery was issued a permit under the "grandfather" provisions of the 1935 Motor Carriers Act, Section 209(a) [49 U.S.C. Section 309(a)],[1] to operate as a "contract carrier" by motor vehicle. The permit authorized Montgomery to transport under individual con- [fol. 66] tracts or agreements with certain classes of shippers certain commodities from certain designated geographical areas to other geographical areas, without restriction as to the actual points of pickup and delivery within the areas specified.

Prior to 1957, a "contract carrier" was defined by Section 203(a)(15) [49 U.S.C. Section 303(a)(15)] as follows:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other

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[1] The pertinent parts of Section 309(a)(1) are:

> "Except as otherwise provided in this section and in section 310a (regarding temporary authority) of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, - - - the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, - - -."

than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

In 1957, the foregoing section was amended to read:

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

To protect the interests of those "contract carriers" who held existing permits but who did not fall within the amended definition of "contract carrier", Congress, in the 1957 amendments, enacted Section 212(c), which provides:

"The Commission shall examine each outstanding permit and may within one hundred and eighty days after August 22, 1957, institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on August 22, 1957, do not conform with the definition of a contract carrier in section 303(a)(15) [fol. 67] of this title as in force on and after August 22, 1957; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same

points or within the same territory as authorized in the permit."

To make certain that no carrier would escape Commission regulation with respect to its interstate operations, there was also included in the 1957 amendment Section 203(c) [49 U.S.C. Section 303(c)] which provides:

> "- - - no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, - - -."

In January, 1958, the Commission instituted a proceeding under Section 212(c) to determine if Montgomery's permit should be revoked and a certificate of public convenience and necessity issued in lieu thereof. Montgomery filed a petition affirmatively seeking conversion of its permit to a certificate.

After hearings, the Commission concluded that Montgomery's operations were no longer those of a "contract carrier" but were those of a "common carrier", were otherwise lawful, ordered Montgomery's permit revoked and authorized the issuance to Montgomery of a certificate of public convenience and necessity.

The certificate authorized Montgomery to transport, as a "common carrier", the same commodities to and from the same geographical areas as set forth in the permit, but as to three of the authorities the certificate restricted [fol. 68] the points of pickup and delivery "to shipments moving from, to, or between wholesale and retail" outlets or stores.[2] These restrictions did not appear in the permit.

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[2] A comparison between the wording of the permit and the certificate as to one of the three questioned authorities will serve to illustrate the differences between the permit and the certificate.

AUTHORITY UNDER PERMIT:

"3. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business

The Commission determined the restrictions were necessary to prevent an enlargement of the scope of operations under the certificate as compared with past operations [fol. 69] under the permit. Or to put it another way, the Commission determined the restrictions were necessary to assure "substantial parity" between future operations under the certificate and past operations under the permit.

By this action Montgomery questions the Commission's authority to impose these restrictions.

The applicable principles of law are:

(1) Administrative determinations must have a basis in law and must be within the granted authority, and it is a judicial function and not an administrative function to determine the limits of the statutory power. *Social Security Board* v. *Nierotko*, 327 U.S. 358.

(2) Orders of an administrative agency may not be set aside, modified or disturbed if they are within the scope of the Commission's statutory authority and are based

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of which is the sale of meat, fruit, and vegetable packinghouse products: *Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line."

AUTHORITY UNDER THE CERTIFICATE:

"*Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on the east of U. S. Highway 87 and on and north of U. S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products.

upon adequate findings, which in turn are supported by substantial evidence. *United States* v. *Peerless Auto Freight Lines*, 327 U.S. 515; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125.

(3) There is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *Baltimore and Ohio R.R.* v. *United States*, 298 U.S. 349.

Montgomery asserts the restrictions are beyond the scope of the Commission's statutory authority.

Montgomery contends that the last sentence of Section 212(c), which reads:

[fol. 70] "Such certificate so issued shall authorize the transportation as a common carrier of the *same* commodities between the *same* points or within the *same* territory as *authorized in the permit.*" (Emphasis added),

is mandatory and allows the Commission no discretion or power to impose territorial restrictions not contained in the permit; that the legislative history discloses no intent on the part of Congress to authorize such territorial restrictions, but on the contrary, the legislative history indicates it was the intent of Congress that there should be no restriction of any rights held under the permit.

The Commission asserts the following statutory authority:

(1) Section 208(a) of the Motor Carriers Act [49 U.S.C. Section 308(a)] relating to issuance of both "grandfather" and new certificates provides that the Commission may specify "the services to be rendered and the routes over which - - - or the territory within which the motor carrier is authorized to operate" and this is statutory authority for the imposition of the restrictions here in question.

(2) The "grandfather" provisions of the Motor Carrier Act, Section 206(a)(1) [49 U.S.C. Section 306(a)(1)], authorize the Commission to assure "substantial parity" between future operations and prior bona fide operations;

that Section 212(c) is in the nature of a "grandfather" provision, and therefore, the Commission has the same power to accomplish "substantial parity" under Section 212(c) as it has under Section 206(a)(1).

(3) There is nothing in 212(c) or its legislative history expressing a congressional intent to limit the Commission's power to impose territorial restrictions in certificates issued to converted carriers and the Commis- [fol. 71] sion's authority is implicit in the Act.

(4) The imposition of territorial restrictions preserving "substantial parity" is responsive to the intent of Congress expressed in the National Transportation Policy's injunction that the Act be administered to the end of developing and preserving an adequate, efficient and economical transportation system.

In short, the Commission construes Section 212(c) to authorize the imposition of such limitations as the Commission determines will accomplish "substantial parity" between Montgomery's previous operations as a permit carrier and its future operations under the certificate.

We will discuss the Commission's contentions in order.

Section 208(a) [49 U.S.C. Section 308(a)] reads in part as follows:

> "Any certificate issued under section 306 (grandfather provisions) or 307 (new certificates) - - - shall specify the service to be rendered and the routes over which - - - the territory within which the motor carrier is authorized to operate."

Under this provision and Section 206(a) [49 U.S.C. Section 306(a)] (grandfather provisions) the delineation of the area and specification of localities which may be served has been entrusted by the Congress to the Commission. *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475 at 480.

But the statutory authority provided by Section 208(a) to delineate the area of service is specifically limited to certificates issued under sections 306 or 307. The certificate in question here was issued under Section 212(c), which contains no such statutory authority. In fact, [fol. 72] Section 212(c) specifically states that the Com-

mission "*shall* authorize the transportation of the *same* commodities between the *same* points or within the *same* territory *as authorized in the permit.*" (Emphasis added). In view of this specific mandate of the Congress, we are unable to read into Section 212(c) the powers of delineation and specification of territory which are contained in Section 208(a).

Nor do the "grandfather" provisions of the Motor Carrier Act, Section 206(a)(1) [49 U.S.C. Section 306(a)(1)], authorize the Commission to impose the restrictions here in question.

The Supreme Court has held that the Commission is empowered to impose territorial limitations on a certificate issued under the "grandfather" provisions to assure "substantial parity" between future operations and prior bona fide operations. *Alton R.R.* v. *United States*, 315 U.S. 475; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 480. However, the authority for this power is derived from express delegations of power by Congress. Section 208 [49 U.S.C. Section 308] provides:

> "Any certificate issued under section 306 (grandfather provisions) - - - shall specify the service to be rendered - - - the territory within which the motor carrier is authorized to operate."

Section 306 referred to above, (Section 206(a) [49 U.S.C. Section 306(a)]) (grandfather provisions), provides that the issuance of a certificate under the grandfather provisions is dependent upon the bona fides of previous operations to be determined by the Commission. It was these two provisions of the Act, (Section 206(a), 49 U.S.C. 306(a) and Section 208(a), 49 U.S.C. 308(a)), to which the Supreme Court pointed in *United States* v. [fol. 73] *Carolina Carriers Corp.*, 315 U.S. 475, when the Court stated:

> "The precise delineation of the area or the specification of localities which may be served has been entrusted by Congress to the Commission."

Section 212(c) neither authorizes the Commission to specify territory nor determine bona fides of prior operations.

The last sentence of Section 212(c) expressly states that the certificate shall authorize transportation "of the *same* commodities between the *same* points - - - *as authorized in the permit.*" (Emphasis added). This is tantamount to saying that the Commission shall not impose territorial restrictions beyond those contained in the permit.

There is nothing in the legislative history cited by the Commission indicating a contrary congressional intent. On the other hand, there is some support in the legislative history for this construction. During the hearings upon the bill before a Subcommittee of the Senate Interstate and Foreign Commerce Committee, the following exchange took place between Mr. Barton, transportation counsel for the Committee, and Mr. Clarke, then chairman of the Interstate Commerce Commission:

> "Mr. Barton: - - -
>
> Mr. Clarke, do you think there is any constitutional difficulty in changing, as we say, as you propose, a contract carrier to a common-carrier status?
>
> Mr. Clarke: No, I can see none. *It isn't taking away from them anything that they have;* it isn't disturbing any property rights of the contract carrier. *It is giving him greater opportunity.* He can still serve his contract shippers, but through the conversion provisions of the bill *he would also have the opportunity to serve the general public as well as the obligation.*" (Emphasis added) (P. 35 Hearings—
> [fol. 74] Surface Transportation—Scope of Authority of Interstate Commerce Commission, 85th Cong. 1st Session).

The fact that Congress has expressed an intention that the Act be administered to the end of developing and preserving an adequate, efficient and economical transportation system, does not give to the Commission unlimited authority to proceed in any manner which the Commission believes will accomplish these objectives. The Commission, in accomplishing the objectives, must proceed within the limit of its statutory authority and we find no such authority to impose the restrictions in question.

The Commission points out that the conversion of the permit to a certificate eliminates the permit restrictions which confined Montgomery's service to those which it served under individual contracts or agreements, and under the certificate Montgomery is now at liberty to serve any members of the public dealing in the commodities authorized for transportation by the certificate. The Commission indicates, that in the absence of restrictions to assure "substantial parity", the scope of the operations of Montgomery and other converted carriers under certificates may be greatly expanded as contrasted with their past operations under permits, and that such enlarged operations will have an adverse effect upon the industry.

This enlargement in the scope of operations of converted carriers was recognized in the legislative history which we have previously quoted. Mr. Clarke, the chairman of the Interstate Commerce Commission, stated that the conversion from a permit to a certificate not only didn't take away anything from the carrier, but gave him [fol. 75] a greater opportunity. "He can still serve his contract shippers, but through the conversion provisions of the bill he would also have the opportunity to serve the general public as well as the obligation." (Hearings supra). There is nothing in the Act or its legislative history indicating that Congress intended to restrict this enlargement of operations by the test of "substantial parity" or otherwise.

Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish "substantial parity" between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history.

The Commission also complains of Montgomery's failure to produce any evidence to demonstrate that it had in the past ever performed any services which could not be continued under the territorial limitations imposed by the Commission. The Commission states:

"In the absence of such evidence, the Commission was justified in concluding that such territorial limitations would enable it to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier, thereby insuring substantial parity betwen the permit and certificate authority."

Having held that a certificate to be issued under Section 212(c) is not subject to the test of "substantial parity" and there being no other issue raised, such as abandonment or dormancy, to which evidence of previous operations would be material, Montgomery was under no compulsion to offer evidence concerning his previous operations.

[fol. 76] We hold that the Commission was without statutory authority to impose the restrictions in question.

The order of the Commission is set aside and the matter is remanded for further action by the Commission in accordance with the views herein expressed.

This opinion sufficiently states the findings of fact and conclusions of law of the court. Further findings of fact and conclusions of law are not necessary.

The Clerk will enter an appropriate judgment.

DATED at Denver, Colorado, this 6th day of July, A. D. 1962.

BY THE COURT:

/s/ Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals

/s/ Alfred A. Arraj, Chief Judge
United States District Court

/s/ Hatfield Chilson, Judge
United States District Court

[fol. 77]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

[File Endorsement Omitted]

JUDGMENT—July 10, 1962

THIS CAUSE came before this statutory court and pursuant to the Memorandum Opinion filed herein, it is

ORDERED that the Order of the Interstate Commerce Commission of September 16, 1960, and the Order of May 17, 1961, in its Docket No. MC-72273 (Sub.No. 3) be set aside and the matter remanded for further action by the Commission in accordance with the views expressed in the Memorandum Opinion of this Court.

DATED at Denver, Colorado, this tenth day of July, 1962.

BY THE COURT:

/s/ Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals

/s/ Alfred A. Arraj, Chief Judge
United States District Court

/s/ Hatfield Chilson, Judge
United States District Court

[fol. 78]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(Title Omitted)

(File Endorsement Omitted)

NOTICE OF APPEAL BY THE UNITED STATES TO THE SUPREME COURT OF THE UNITED STATES— Filed September 7, 1962

I.

Notice is hereby given that the United States of America, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment and order entered in this action on July 10, 1962.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II.

The Clerk of the District Court will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of the plaintiff, filed January 16, 1962, with its Appendices "A", "B", "C", "D", "E", "F", and "G".

2. Order of Court of January 24, 1962, designating the three-judge court to hear and decide the case.

3. Joint Answer of the United States of America and Interstate Commerce Commission, filed March 19, 1962.

4. Notice by the Court of April 6, 1962, of the scheduled hearing before the court on May 22, 1962.

5. Stipulation regarding the filing of simultaneous briefs prior to oral argument.

[fol. 79] 6. Order of Court of May 14, 1962, for the filing of briefs pursuant to the stipulation of the parties.

7. Order of Court approving a stipulation that J. B. Montgomery, Inc., an Iowa corporation, the successor in

interest to J. B. Montgomery, Inc., a Nebraska corporation, be substituted as Plaintiff.

8. Those documents presented to the Court by plaintiff as the record made before the Interstate Commerce Commission in its Docket No. MC-72273.

9. All other documents, if any, presented to the Court by any party to the suit.

10. Opinion of the Court, filed July 6, 1962.

11. Judgment of the Court, filed July 10, 1962.

12. All other orders, if any, entered by the Court in this case.

13. The clerk's docket and minutes entries in the case.

14. This Notice of Appeal.

III.

The following question is presented by this appeal:

Whether the Interstate Commerce Commission, in a proceeding under Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c), converting a contract carrier permit into a common carrier certificate, may limit the carrier's authority to service to, from, or between the particular types of business which, under the contract carrier permit, the carrier had been authorized to serve.

/s/ Robert B. Hummel
Attorney
Department of Justice

Dated:

[fol. 80] [CERTIFICATE OF SERVICE Omitted in Printing]

[fol. 81]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

[Title Omitted]

[File Endorsement Omitted]

NOTICE OF APPEAL BY THE INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed September 7, 1962

I.

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment and order entered in this action on July 10, 1962.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II.

The Clerk of the District Court will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of the plaintiff, filed January 16, 1962, with its Appendices "A", "B", "C", "D", "E", "F", and "G".

2. Order of Court of January 24, 1962, designating the three-judge court to hear and decide the case.

[fol. 82] 8. Joint Answer of the United States of America and Interstate Commerce Commission, filed March 19, 1962.

4. Notice by the Court of April 6, 1962, of the scheduled hearing before the court on May 22, 1962.

5. Stipulation regarding the filing of simultaneous briefs prior to oral argument.

6. Order of Court of May 14, 1962, for the filing of briefs pursuant to the stipulation of the parties.

7. Order of Court approving a stipulation that J. B. Montgomery, Inc., an Iowa corporation, the successor in interest to J. B. Montgomery, Inc., a Nebraska corporation, be substituted as Plaintiff.

8. Those documents presented to the court by plaintiff as the record made before the Interstate Commerce Commission in its Docket No. MC-72273.

9. All other documents, if any, presented to the court by any party to the suit.

10. Opinion of the Court, filed July 6, 1962.

11. Judgment of the Court, filed July 10, 1962.

12. All other orders, if any, entered by the Court in the case.

13. The clerk's docket and minute entries in the case.

14. This Notice of Appeal.

III.

The following questions are presented by this appeal:

(1) Whether the District Court erred in holding that the Interstate Commerce Commission lacks the power, in a conversion proceeding arising under section 212(c) of the Interstate Commerce Act, 49 U.S.C. § 312(c), to limit the common carrier certificate issued on conversion [fol. 83] to service to, from, or between the facilities of a particular type of business, when the previously-held contract carrier permit had limited the carrier to service performed under contract with persons who are engaged in that same type of business.

(2) Whether the District Court erred in holding that the Interstate Commerce Commission lacks the power, in a conversion proceeding under section 212(c), to limit the

common carrier certificate issued on conversion so as to authorize only the same type of service which had been authorized by the previously-held contract carrier permit.

/s/ Betty Jo Christian
Attorney
Interstate Commerce Commission
Washington 25, D. C.

/s/ Robert W. Ginnane
General Counsel

Attorneys for the Interstate Commerce Commission

[fol. 84]

[PROOF OF SERVICE omitted in Printing]

[fols. 85-88] * * *

[fol. 89]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 90]

SUPREME COURT OF THE UNITED STATES

No. 791, October Term, 1962

UNITED STATES, ET AL., APPELLANTS

vs.

J. B. MONTGOMERY, INC.

ORDER NOTING PROBABLE JURISDICTION—March 25, 1963

APPEAL from the United States District Court for the District of Colorado.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

March 25, 1963

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 686143 1155

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

J. B. MONTGOMERY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, pp. 15–27) is reported at 206 F. Supp. 455. The report of the Interstate Commerce Commission (App. C. *infra*, pp. 29–41) is printed at 83 M.C.C. 457.[1]

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325, to set aside an order of the

[1] The report of Division 1 of the Commission involved two applications: MC–72273, Modification of Permit, and MC–72273 (Sub-No. 3), Conversion Application. Only the Commission's order in the latter (the Sub-No. 3) proceeding is involved in this appeal. The entire Commission denied petitions for reconsideration on May 17, 1961.

Interstate Commerce Commission. The judgment of the three-judge district court (App. B, *infra*, p. 28) was entered on July 10, 1962, and notices of appeal were filed in that court on September 7, 1962, by the United States and the Interstate Commerce Commission. The district court extended the time to docket the case in this Court to February 4, 1963.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133; *American Trucking Associations, Inc., et al.* v. *United States, et al.*, 364 U.S. 1.

STATUTE INVOLVED

Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)), as amended August 22, 1957, 71 Stat. 411, provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Prior to the 1957 amendment, Section 203(a)(15) (49 U.S.C. (1952 ed.) 303(a)(15)) was as follows:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) of this section and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

Section 204 (b) of the Interstate Commerce Act (54 Stat. 922) provides:

> The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

Section 212(c) of the Interstate Commerce Act (49 U.S.C. 312(c), as amended August 22, 1957, 71 Stat. 411), provides:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and

> hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

QUESTION PRESENTED

Whether the Interstate Commerce Commission, in converting a contract carrier permit of a motor carrier to a common carrier certificate under the "grandfather" provision of Section 212(c) of the Interstate Commerce Act, may restrict the carrier to serving facilities of particular types of business, in order to insure substantial parity between the carrier's new authority and its authority under the prior permit.

STATEMENT

Prior to 1957 the appellee ("Montgomery") was the holder of a contract carrier permit authorizing extensive operations. The permit (App. D, *infra*) did not specify the particular commodities which the carrier could transport, but defined its operating authority in terms of commodities usually dealt in or used by particular types of businesses. Thus, the permit authorized Montgomery to transport (App. D, *infra*, pp. 43-44):

(1) Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, equipment, materials and supplies used in the conduct of such businesses.

(2) Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packing houses.

(3) Such commodities, as are usually dealt in, or used by, wholesale and retail department stores.

Although the permit authorized Montgomery to serve a broad geographical area, it could transport only under contracts with persons operating the foregoing classes of businesses. The purpose of this type of authority was to allow the contract carrier to perform virtually all the motor transportation needs of the shippers whose businesses it served.

In 1957 Congress, concerned that under this Court's decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, contract carriers would be able to serve a large number of customers, amended the definition of contract carrier in Section 203(a)(15) to impose stricter standards upon the authorized operations of such carriers.[1] At the same time, it added Section 212(c), which provides for the revocation of the contract carrier permit of, and the issuance of a common carrier certificate to, any permit holder whose operations on the effective date of the Act (August 22, 1957) did not conform to the amended definition of ~~common~~ contract carriage. The subsection further provides:

[1] See S. Rep. No. 703, 85th Cong., 1st Sess., p. 7.

> Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

In January 1958 the Commission instituted a proceeding under Section 212(c) to determine whether the appellee's contract carrier permit should be revoked and a common carrier certificate issued in its place. The appellee subsequently filed an application for conversion of its permit to a certificate, and various carriers intervened in opposition to the conversion.

After full administrative proceedings, the Commission (Division 1) held that appellee's operations did not conform to the amended definition of a contract carrier, revoked its permit, and issued to it a common carrier certificate. The certificate, like the permit, described the commodities to be carried in terms of products customarily dealt in or used by various specified types of businesses, such as packinghouses and department stores. In order to enable the carrier "to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier thereby insuring substantial parity between the permit and certificate authority," the Commission determined to restrict the carrier's authority "to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract" (App. C, *infra*, p. 38). More specifically, the certificate limits the carrier to providing service on such commodities "to shipments moving, from, to, or between wholesale and

retail" outlets or stores (App. E., *infra*, pp. 47–48).[1]

The appellee filed suit in the district court to set aside the Commission's order insofar as it limited operating authority to movements from, to or between facilities of particular types of businesses. The district court held that the Commission "was without statutory authority to impose the restrictions in question," set the Commission's order aside, and remanded for further proceedings (App. A., *infra*, pp. 26–27). In the court's view, the Commission has no authority "to impose restrictions to accomplish 'substantial parity' between past and future operations" (*id.*, p. 26).

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question of statutory interpretation involving the authority of the Interstate Commerce Commission under the 1957 amendments to the Interstate Commerce Act. In that Act Congress, because of concern over the inroads that contract carriers had been making into the business of common carriers, amended the definition of contract carrier to impose stricter standards upon the permissible activities of such carriers. At the same time, it provided that existing contract carriers whose activities did not meet the new statutory defini-

[1] The Commission also imposed a prohibition against the combination of appellee's various operating rights in order to render a through service (a practice known in the industry as "tacking") (App. C, *infra*, p. 38). That restriction was not challenged in the district court. The Commission rejected the proposal of the intervenors that restrictions should be imposed upon the appellee's right to "interchange of traffic with other common carriers" (*id.*, pp. 37–38).

tion could convert their permits into common-carrier certificates under a grandfather provision which entitled them, without any showing of public convenience and necessity, to a certificate authorizing "the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit." Congress intended by this provision to grant the new common carriers substantially the same operating authority they previously had had as contract carriers. The question in this case is whether these statutory provisions authorize the Commission, in the case of a contract carrier whose commodity authority is defined not in terms of specified commodities but in terms of products customarily handled by particular types of businesses, to impose limitations upon the business facilities to be served which are designed to achieve "substantial parity" between the carrier's operations under its old permit and its new certificate.

1. The question is important in the administration of the Act. A substantial number of contract-carrier permits define the commodities to be carried in terms of products customarily handled by particular types of businesses. Indeed, such a definition may be essential to give a carrier authority to provide complete transportation service for someone who handles a large variety of products. If the Commission cannot impose, upon the conversion of such permits to certificates, limitations designed to insure that the new authority does not permit substantially broader operations than the old, the effect of the statutory conversion of the operating authority from contract to

common carriage could be a vast expansion of the permissible scope of authorized operations.

For example, in the present case the appellee's old permit authorized it to carry commodities customarily dealt in by wholesale and retail hardware and automobile accessory businesses, by meat, fruit and vegetable packing houses, and by wholesale and retail department stores, or commodities used by either of the latter two categories. This authority is broad enough to authorize the transportation of such major items as petroleum products, coal, building materials, groceries, refrigeration equipment, motor vehicles, office, kitchen, and restaurant furniture and equipment, and stationery and office supplies. Under the old permits, however, Montgomery was only authorized to transport this broad range of products for persons operating the designated categories of businesses. The new certificate attempted to preserve this restriction by limiting Montgomery's common-carrier operations to shipments from, to, or between wholesale and retail outlets or stores. Without such a restriction, the effect of the conversion from contract carrier permit to common carrier certificate would be to permit the carrier "to enlarge and expand the business beyond the pattern which it had acquired prior to [August 22, 1957]" (*Noble* v. *United States*, 319 U.S. 88, 92).

There have been at least sixty-five conversion proceedings under Section 212(c) in which the certificates issued in place of the permits contain provisions similar to those involved in this case. All of the Commission orders imposing such limitations are still

subject to judicial review, there being no explicit limitation period on the institution of proceedings for review of Commission orders. In addition, there are two other pending court cases involving the same issue.[4] Plainly, this is an important statutory question which has a significant impact upon the motor-carrier industry, and which warrants plenary review by this Court.

2. The district court held that "the Commission was without statutory authority to impose the restrictions in question," and it stated that "[a]ny adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish 'substantial parity' between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history" (App. A, *infra*, p. 26). We submit that, to the contrary, the Commission does have statutory authority to impose such restrictions, and that such authority is supported not only by the language and legislative history of the Act, but by the decisions of this Court interpreting the earlier "grandfather" provisions of the Motor Carrier Act.

a. Section 212(c) provides that a certificate issued to a former contract carrier in conversion proceedings

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[4] *Zuzich Truck Line, Inc.* v. *United States and Interstate Commerce Commission*, Civ. Action No. KC-1640, U.S.D.C., Kansas, which was [redacted] on August 30, 1962, and *Fischbach Trucking Company, et al.* v. *United States and Interstate Commerce Commission, et al.*, Civil Action No. 37218, U.S.D.C., N.D. Ohio, E. Div., in which briefs have been filed and which is awaiting argument.

"shall authorize the transportation * * * of the same commodities between the same points or within the same territory as authorized in the permit." As the District Court for the District of New Jersey recently pointed out, "[t]he purpose of the limitation contained in that proviso is obviously to maintain substantial parity with the operating authority contained in [the carrier's] contract carrier permits, and is in accord with the legislative intent implicit in section 212(c) of the Act * * *." *Tar Asphalt Trucking Co., Inc.* v. *United States*, 208 F. Supp. 611, 614, pending on jurisdictional statement, No. 762, this Term; see also the subsequent statement of that court in *P. Saldutti & Son, Inc.* v. *United States*, 210 F. Supp. 307, 314, that "[u]nder Section 212(c) of the Act, a converted carrier is entitled to receive at the hands of the Commission a certificate that maintains parity with the operating authority contained in its contract carrier permit." The statutory design of Section 212(c) thus adopted the plan of the original "grandfather" clause of the Motor Carrier Act, which provided for "substantial parity between future operations and prior *bona fide* operations" (*Alton Railroad Co.* v. *United States*, 315 U.S. 15, 22; see *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561).

Section 212(c) provides that the certificate shall authorize the transportation "of the same commodities * * * as authorized in the permit." This Court has recognized that "the business of the contract carrier" may sometimes have to be defined "in terms of the type or class of shippers served" in order to achieve the substantial parity between past and future

operations which the original "grandfather" clause contemplated. *Noble* v. *United States*, 319 U.S. 88, 92. In the present case, Montgomery's permit limited the commodities to be carried not only to products customarily dealt in or used by particular businesses, but also to products actually used by persons engaged in such business. The provision in the certificate limiting the transportation of such products to shipments "from, to, or between" such businesses—designed to achieve the substantial parity between contract and common carriage which the Act contemplates—may properly be viewed and upheld as an authorization "of the same commodities * * * as authorized in the permit."

The restriction may also be viewed as an exercise of the Commission's power under Section 204(b). That Section authorizes the Commission to establish just and reasonable classifications of groups of carriers, and such just and reasonable requirements for carriers so classified as the Commission deems necessary or desirable in the public interest. In Section 212(c) Congress itself classified a group of carriers, that is, it singled out contract carriers whose operations do not meet the new definition and provided for their conversion to common carriers. In imposing restrictions upon such converted carriers intended to insure substantial parity between their old and new operations, the Commission established a requirement which it deemed necessary or desirable in the public interest.

While the legislative history does not throw much light on the precise issue, it does indicate that the

basic purpose of Congress was to permit existing contract carriers whose activities did not meet the new definition to continue their existing operations as a common carrier. See S. Rep. No. 703, 85th Cong., 1st Sess.; Note, 107 U. of Pa. L. Rev. 1150. There is certainly nothing in the legislative history which indicates that Congress intended that the conversion of permits to certificates would confer upon the carriers the windfall to their operating authorities which the decision of the district court in this case would permit.

b. The district court held, however, that the limitation which the Commission imposed upon Montgomery's operating authority was really a territorial restriction, and that Section 212(c), unlike the original grandfather clause, does not authorize the Commission "to specify territory" or to "impose territorial restrictions beyond those contained in the permit" (App. A, *infra*, p. 24). There are several answers to this argument. *First*, as shown above, while the limitation unquestionably has territorial effects, it may properly be viewed as a specification of the commodities to be carried. *Second*, Section 212(c) authorizes the certificate to limit operations to "the same points" or "the same territory" as provided in the permit. By limiting Montgomery to contracts with persons operating specified types of businesses, the permit did in effect limit the points and territories which Montgomery could serve. The limitation in the certificate, designed to restrict Montgomery to substantially the same activities as those previously performed, may therefore be viewed as a specification of "the same

points" and "the same territory" which it served as a contract carrier. *Third,* in view of the Congressional purpose of achieving substantial parity of contract and common carrier operations, it is not unreasonable to read into Section 212(c) by implication the specific authority which Section 208(a) gives the Commission, in the issuance of certificates under the original grandfather provision, to "specify the service to be rendered and the * * * territory within which, the motor carrier is authorized to operate * * *."

CONCLUSION

This appeal presents a substantial question of statutory interpretation which warrants plenary consideration by this Court. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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Interstate Commerce Commission.

FEBRUARY, 1963.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Before BREITENSTEIN, Circuit Judge, ARRAJ and CHILSON, District Judges.

CHILSON, District Judge.

MEMORANDUM OPINION AND ORDER

This is an appeal from a decision of the Interstate Commerce Commission, herein referred to as the "Commission".

After the filing of the complaint herein, J. B. Montgomery, Inc., an Iowa corporation, succeeded to the interests of the original plaintiff, J. B. Montgomery, Inc., a Nebraska corporation, and the former has been substituted as plaintiff herein. Both will be referred to herein as "Montgomery."

The controversy centers around certain restrictions placed by the Commission in a certificate of public convenience and necessity issued to Montgomery in 1961.

The events leading to the dispute are as follows:

Montgomery was issued a permit under the "grandfather" provisions of the 1935 Motor Carriers Act,

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Section 209(a) [49 U.S.C. Section 309(a)],[1] to operate as a "contract carrier" by motor vehicle. The permit authorized Montgomery to transport under individual contracts or agreements with certain classes of shippers certain commodities from certain designated geographical areas to other geographical areas, without restriction as to the actual points of pickup and delivery within the areas specified.

Prior to 1957, a "contract carrier" was defined by Section 203(a)(15) [49 U.S.C. Section 303(a)(15)] as follows:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

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[1] The pertinent parts of Section 309(a)(1) are:

"Except as otherwise provided in this section and in section 310a (regarding temporary authority) of this title no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such permit, without further proceedings if application for such permit was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, * * *."

In 1957, the foregoing section was amended to read:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

To protect the interests of those "contract carriers" who held existing permits but who did not fall within the amended definition of "contract carrier", Congress, in the 1957 amendments, enacted Section 212(c), which provides:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after August 22, 1957, institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on August 22, 1957, do not conform with the definition of a contract carrier in section 303(a)(15) of this title as in force on and after August 22, 1957; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or

within the same territory as authorized in the permit.

To make certain that no carrier would escape Commission regulation with respect to its interstate operations, there was also included in the 1957 amendment Section 203(c) [49 U.S.C. Section 303(c)] which provides:

> * * * no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation * * *.

In January, 1958, the Commission instituted a proceeding under Section 212(c) to determine if Montgomery's permit should be revoked and a certificate of public convenience and necessity issued in lieu thereof. Montgomery filed a petition affirmatively seeking conversion of its permit to a certificate.

After hearings, the Commission concluded that Montgomery's operations were no longer those of a "contract carrier" but were those of a "common carrier", were otherwise lawful, ordered Montgomery's permit revoked and authorized the issuance to Montgomery of a certificate of public convenience and necessity.

The certificate authorized Montgomery to transport, as a "common carrier", the same commodities to and from the same geographical areas as set forth in the permit, but as to three of the authorities the certificate restricted the points of pickup and delivery "to shipments moving from, to, or between wholesale

and retail" outlets or stores.[2] These restrictions did not appear in the permit.

The Commission determined the restrictions were necessary to prevent an enlargement of the scope of operations under the certificate as compared with past operations under the permit. Or to put it another

[2] A comparison between the wording of the permit and the certificate as to one of the three questioned authorities will serve to illustrate the differences between the permit and the certificate.

AUTHORITY UNDER PERMIT:

"3. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packinghouse products: *Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line."

AUTHORITY UNDER THE CERTIFICATE:

"*Such Commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

"Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on the east of U.S. Highway 87 and on and north of U.S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

"RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products."

way, the Commission determined the restrictions were necessary to assure "substantial parity" between future operations under the certificate and past operations under the permit.

By this action Montgomery questions the Commission's authority to impose these restrictions.

The applicable principles of law are:

(1) Administrative determinations must have a basis in law and must be within the granted authority, and it is a judicial function and not an administrative function to determine the limits of the statutory power. *Social Security Board* v. *Nierotko*, 327 U.S. 358.

(2) Orders of an administrative agency may not be set aside, modified or disturbed if they are within the scope of the Commission's statutory authority and are based upon adequate findings, which in turn are supported by substantial evidence. *United States* v. *Pierce Auto Freight Lines* 327 U.S. 515; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125.

(3) There is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *Baltimore and Ohio RR.* v. *United States*, 298 U.S. 349.

Montgomery asserts the restrictions are beyond the scope of the Commission's statutory authority.

Montgomery contends that the last sentence of Section 212(c), which reads:

> Such certificate so issued shall authorize the transportation as a common carrier of the *same* commodities between the *same* points or within the *same* territory as *authorized in the permit*. (Emphasis added).

is mandatory and allows the Commission no discretion or power to impose territorial restrictions not contained in the permit; that the legislative history discloses no intent on the part of Congress to authorize such territorial restrictions, but on the contrary, the legislative history indicates it was the intent of Congress that there should be no restriction of any rights held under the permit.

The Commission asserts the following statutory authority:

(1) Section 208(a) of the Motor Carriers Act [49 U.S.C. Section 308(a)] relating to issuance of both "grandfather" and new certificates provides that the Commission may specify "the services to be rendered and the routes over which * * * or the territory within which the motor carrier is authorized to operate" and this is statutory authority for the imposition of the restrictions here in question.

(2) The "grandfather" provisions of the Motor Carrier Act, Section 206(a)(1) [49 U.S.C. Section 306(a)(1)], authorize the Commission to assure "substantial parity" between future operations and prior bona fide operations; that Section 212(c) is in the nature of a "grandfather" provision, and therefore, the Commission has the same power to accomplish "substantial parity" under Section 212(c) as it has under Section 206(a)(1).

(3) There is nothing in 212(c) or its legislative history expressing a congressional intent to limit the Commission's power to impose territorial restrictions in certificates issued to converted carriers and the Commission's authority is implicit in the Act.

(4) The imposition of territorial restrictions preserving "substantial parity" is responsive to the intent of Congress expressed in the National Transportation Policy's injunction that the act be adminis-

tered to the end of developing and preserving an adequate, efficient and economical transportation system.

In short, the Commission construes Section 212(c) to authorize the imposition of such limitations as the Commission determines will accomplish "substantial parity" between Montgomery's previous operations as a permit carrier and its future operations under the certificate.

We will discuss the Commission's contentions in order.

Section 208(a) [49 U.S.C. Section 308(a)] reads in part as follows:

> Any certificate issued under section 306 (grandfather provisions) or 307 (new certificates) * * * shall specify the service to be rendered and the routes over which * * * the territory within which the motor carrier is authorized to operate.

Under this provision and Section 206(a) [49 U.S.C. Section 306(a)] (grandfather provisions) the delineation of the area and specification of localities which may be served has been entrusted by the Congress to the Commission. *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475 at 480.

But the statutory authority provided by Section 208(a) to delineate the area of service is specifically limited to certificates issued under sections 306 or 307. The certificate in question here was issued under Section 212(c), which contains no such statutory authority. In fact, Section 212(c) specifically states that the Commission *"shall* authorize the transportation of the *same* commodities between the *same* points or within the *same* territory *as authorized in the permit."* (Emphasis added.) In view of this specific mandate of the Congress, we are unable to read into

Section 212(c) the powers of delineation and specification of territory which are contained in Section 208(a).

Nor do the "grandfather" provisions of the Motor Carrier Act, Section 206(a)(1) [49 U.S.C. Section 306(a)(1)], authorize the Commission to impose the restrictions here in question.

The Supreme Court has held that the Commission is empowered to impose territorial limitations on a certificate issued under the "grandfather" provisions to assure "substantial parity" between future operations and prior bona fide operations. *Alton R.R.* v. *United States,* 315 U.S. 475; *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 480. However, the authority for this power is derived from express delegations of power by the Congress. Section 208 [49 U.S.C. Section 308] provides:

> Any certificate issued under section 306 (grandfather provisions) * * * shall specify the service to be rendered * * * the territory within which the motor carrier is authorized to operate.

Section 306 referred to above, (Section 206(a) [49 U.S.C. Section 306(a)]) (grandfather provisions), provides that the issuance of a certificate under the grandfather provisions is dependent upon the bona fides of previous operations to be determined by the Commission. It was these two provisions of the Act, (Section 206(a), 49 U.S.C. 306(a) and Section 208 (a), 49 U.S.C. 308(a)), to which the Supreme Court pointed in *United States* v. *Carolina Carriers Corp.,* 315 U.S. 475, when the Court stated:

> The precise delineation of the area or the specification of localities which may be served has been entrusted by Congress to the Commission.

Section 212(c) neither authorizes the Commission to specify territory nor determine bona fides of prior operations.

The last sentence of Section 212(c) expressly states that the certificate shall authorize transportation "of the *same* commodities between the *same* points * * * *as authorized in the permit.*" (Emphasis added.) This is tantamount to saying that the Commission shall not impose territorial restrictions beyond those contained in the permit.

There is nothing in the legislative history cited by the Commission indicating a contrary congressional intent. On the other hand, there is some support in the legislative history for this construction. During the hearings upon the bill before a Subcommittee of the Senate Interstate and Foreign Commerce Committee, the following exchange took place between Mr. Barton, transportation counsel for the Committee, and Mr. Clarke, then chairman of the Interstate Commerce Commission:

> Mr. BARTON. * * *
>
> Mr. Clarke, do you think there is any constitutional difficulty in changing, as we say, as you propose, a contract carrier to a common-carrier status?
>
> Mr. CLARKE. No, I can see none. *It isn't taking away from them anything that they have;* it isn't disturbing any property rights of the contract carrier. *It is giving him greater opportunity.* He can still serve his contract shippers, but through the conversion provisions of the bill *he would also have the opportunity to serve the general public as well as the obligation.* (Emphasis added.) (P. 35 Hearings—Surface Transportation—Scope of Authority of Interstate Commerce Commission, 85th Cong. 1st Session.)

The fact that Congress has expressed an intention that the Act be administered to the end of developing and preserving an adequate, efficient and economical transportation system, does not give to the Commission unlimited authority to proceed in any manner which the Commission believes will accomplish these objectives. The Commission, in accomplishing the objectives, must proceed within the limit of its statutory authority and we find no such authority to impose the restrictions in question.

The Commission points out that the conversion of the permit to a certificate eliminates the permit restrictions which confined Montgomery's service to those which it served under individual contracts or agreements, and under the certificate Montgomery is now at liberty to serve any members of the public dealing in the commodities authorized for transportation by the certificate. The Commission indicates, that in the absence of restrictions to assure "substantial parity", the scope of the operations of Montgomery and other converted carriers under certificates may be greatly expanded as contrasted with their past operations under permits, and that such enlarged operations will have an adverse effect upon the industry.

This enlargement in the scope of operations of converted carriers was recognized in the legislative history which we have previously quoted. Mr. Clarke, the chairman of the Interstate Commerce Commission, stated that the conversion from a permit to a certificate not only didn't take away anything from the carrier, but gave him a greater opportunity. "He can still serve his contract shippers, but through the conversion provisions of the bill he would also have the opportunity to serve the general public as well as the obligation." (Hearings, supra.) There is nothing in the Act or its legislative history indicat-

ing that Congress intended to restrict this enlargement of operations by the test of "substantial parity" or otherwise.

Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish "substantial parity" between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history.

The Commission also complains of Montgomery's failure to produce any evidence to demonstrate that it had in the past ever performed any services which could not be continued under the territorial limitations imposed by the Commission. The Commission states:

> In the absence of such evidence, the Commission was justified in concluding that such territorial limitations would enable it to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier, thereby insuring substantial parity between the permit and certificate authority.

Having held that a certificate to be issued under Section 212(c) is not subject to the test of "substantial parity" and there being no other issue raised, such as abandonment or dormancy, to which evidence of previous operations would be material, Montgomery was under no compulsion to offer evidence concerning his previous operations.

We hold that the Commission was without statutory authority to impose the restrictions in question.

The order of the Commission is set aside and the matter is remanded for further action by the Com-

mission in accordance with the views herein expressed.

This opinion sufficiently states the findings of fact and conclusions of law of the court. Further findings of fact and conclusions of law are not necessary.

The Clerk will enter an appropriate judgment.

DATED at Denver, Colorado, this 6th day of July, A. D. 1962.

BY THE COURT:

JEAN S. BREITENSTEIN
Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals

ALFRED A. ARRAJ
Alfred A. Arraj, Chief Judge
United States District Court

HATFIELD CHILSON
Hatfield Chilson, Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER REMANDING FOR FURTHER ACTION

THIS CAUSE came before this statutory court and pursuant to the Memorandum Opinion filed herein, it is

ORDERED that the Order of the Interstate Commerce Commission of September 16, 1960, and the Order of May 17, 1961, in its Docket No. MC-72272 (Sub. No. 3) be set aside and the matter remanded for further action by the Commission in accordance with the views expressed in the Memorandum Opinion of this Court.

DATED at Denver, Colorado, this tenth day of July, 1962.

BY THE COURT:

JEAN S. BREITENSTEIN
Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals

ALFRED A. ARRAJ
Alfred A. Arraj, Chief Judge
United States District Court

HATFIELD CHILSON
Hatfield Chilson, Judge
United States District Court

APPENDIX C

M-10190

INTERSTATE COMMERCE COMMISSION

No. MC-72273 [1]

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

Decided September 16, 1960

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1. In No. MC-72273, petitioner, as successor in interest, found entitled to additional authority by reason of predecessor's operations conducted on July 1, 1935, and continuously since that time.
2. In No. MC-72273 (Sub-No. 3), operations of applicant found to be those of a common carrier by motor vehicle, and applicant found to be entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, of the commodities, and from, to, or between the points or territories authorized by its presently held permit. Issuance of a certificate in lieu of presently held permit approved upon compliance by applicant with certain conditions, and application in all other respects denied. Proceeding instituted herein, on our own motion; discontinued.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND HERRING

BY DIVISION 1:

These proceedings were heard separately, but were the subject of a single report and recommended order

[1] This report also embraces No. MC-72273 (Sub-No. 3), J. B. Montgomery, Inc., Conversion Application.

of an examiner. They concern related matters and will be disposed of here in a single report. Exceptions to the orders recommended by the examiner in both proceedings were filed by certain protestants, and J. B. Montgomery, Inc., hereinafter called Montgomery, petitioner in the title proceeding and applicant in the subtitled proceeding, replied. Our conclusions differ somewhat from those recommended.

In No. MC–72273, hereinafter called the "grandfather" proceeding, by petition filed November 20, 1957, Montgomery, of Denver, Colo., seeks to have the proceeding in which its permit, No. MC–72273, which is reproduced in appendix A hereto, was issued to its predecessor in interest, reopened and its permit modified to authorize the transportation which, it is claimed, Montgomery and its predecessor have performed for the Gates Rubber Company, hereinafter called Gates, of Denver, Colo., prior to and since July 1, 1935. At the hearing, Montgomery, through its president, indicated that it desired modification of the permit so as to include, in addition to the authority now embraced in its permit, the authority set forth in appendix B hereto. Numerous motor carriers [2] oppose the petition.

In No. MC–72273 (Sub-No. 3), hereinafter called the conversion proceeding, by order of January 3, 1958, division 1, upon its own initiative, instituted a proceeding under section 212(c) of the Interstate

[2] Illinois-California Express, Inc., Interstate Motor Lines, Inc., Denver-Chicago Trucking Company, Inc., Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., Watson Bros. Transportation Co., Inc., Centennial Truck Lines, Inc., and Buckingham Transportation, Inc., in its own behalf and as operator of Des Moines Transportation, Inc., hereinafter called I.C.X., Interstate, Denver-Chicago, Ringsby, Navajo, Watson, Centennial, and Buckingham respectively.

Commerce Act to determine whether Montgomery's outstanding permit, authorizing the operations described in appendix A, should be revoked and a certificate of public convenience and necessity issued in lieu thereof. The order instituting the proceeding names Montgomery as respondent. Thereafter, on February 18, 1958, Montgomery also filed an application for conversion under section 212(c). We will dispose of the conversion matter on the basis of the application filed by Montgomery. All of the protestants in the "grandfather" proceeding and Pacific Intermountain Express Co., hereinafter called P.I.E., oppose the conversion.

In the "grandfather" proceeding the examiner recommended that permit No. MC–72273 should be modified to include the transportation, over irregular routes of (1) such commodities as are usually dealt in by manufacturers of rubber and rubber products, from Denver to Chicago, Ill., and Omaha, Nebr., and (2) materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago, and points in Illinois within 100 miles of Chicago, to Denver. Watson, on separate exceptions and I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo, on joint exceptions, contend generally that the evidence of Montgomery's witnesses, unsupported by written documents, is not the best evidence; that there were some inconsistencies in the testimony; and that Montgomery has delayed for an unnecessarily long time in taking any action to modify its authority. I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo also contend that the examiner erred in refusing to receive certain letters in evidence; and if any authority is granted it should only authorize service between Denver and Chicago restricted to pickup or delivery at the site of the Gates plant at Denver. In

reply Montgomery contends that the evidence presented on its behalf is reliable and consistent, and that the findings of the examiner are fully supported by the evidence.

In the conversion proceeding the examiner found that Montgomery's operations on August 22, 1957, did not conform to the definition of a contract carrier as set forth in section 203(a)(15), as amended; and that such operations were those of a common carrier by motor vehicle and were otherwise lawful. He recommended that an appropriate certificate, in lieu of the permit now held by Montgomery, be issued with the so-called Keystone restrictions omitted therefrom. On exceptions all those opposing the conversion, with the exception of Centennial, contend, collectively or individually, that the examiner erred (1) in failing to impose restrictions against interchange and tacking, (2) in eliminating existing Keystone restrictions, and (3) in failing to consider the issue of dormancy. In addition certain protestants contend that Montgomery did not meet the burden of proving that it was a common carrier; and that the operations of Montgomery and its predecessor were not "otherwise lawful" as required by section 212(c). Montgomery replies that its operations do not conform to the definition of a contract carrier, that they are those of a common carrier, and are otherwise lawful; and that no restrictions should be imposed in the certificate to be issued.

The evidence adduced, the examiner's recommendations, the exceptions, and the replies thereto have been considered. We find that the material facts are correctly stated in the examiner's report, and we adopt such statement, as hereinafter supplemented, as our own.

THE "GRANDFATHER" PROCEEDING

The considered permit stems from a "grandfather" application filed on February 10, 1936, by Montgomery's predecessor, Joseph Burton Montgomery, doing business as Montgomery Transfer. Following informal field investigations and the issuance of so-called compliance orders, a permit was issued to petitioner on August 31, 1943, authorizing it to conduct the operations which are described in appendix A hereto. Montgomery claims that its predecessor also transported, during the "grandfather" period, the commodities, in the manner, and to and from the points described in appendix B, and that its predecessor and it have been so operating since that time under the impression that such movements were authorized by the permit in issue.

The record contains a deposition of the predecessor, and oral testimony of Montgomery's president, two witnesses representing Gates, an insurance broker, two former drivers of Montgomery and its predecessor, a driver who drove for a competitor of the predecessor, and a former traffic manager of one of the predecessor's shippers.

The predecessor commenced motor-carrier operations in 1932, and when the business was incorporated on or about 1938 he became president and principal stockholder until 1945 when he retired. He recalls transporting, prior to July 1, 1935, shipments of tires and other rubber goods from Denver to Chicago for Gates, and some westbound transportation of general supplies used in the manufacturing of tires from Chicago to Denver for the same company under an oral agreement. He often drove one of his own trucks. From July 1, 1935, until his retirement he continued to perform services for Gates. He kept a limited bookkeeping system, but the records of his operation

have been destroyed. Montgomery's president, son of the predecessor, has been associated with it since 1946, and has been president since 1949. He testified that, to his personal knowledge and recollection, Montgomery has provided transportation for Gates since 1946.

The vice president for traffic of Gates, employed by Gates since 1912, has used the predecessor's and Montgomery's service for the transportation of tires and other rubber goods from the Gates plant at Denver to Chicago and Omaha from before 1935 to the present time. Also both Montgomery and its predecessor have transported machinery and supplies for Gates since prior to 1935, from Chicago and from unspecified points within 100 miles of Chicago to Denver. The sales manager of Gates' warehouse at Chicago from 1929 to August 1936, knew the predecessor in this period and remembers Montgomery's trucks performing a transportation service inbound to the Chicago warehouse from Denver. One former truck-driver of the predecessor recollects transporting shipments for Gates in 1937 from Denver and also loading tires at the Gates plant, and another truck-driver, who drove for Montgomery and its predecessor from 1936 to 1942, recalls handling loads for Gates continuously during that period. A former competitor of the predecessor in 1932 and 1933 often saw the trucks of the predecessor at the Gates plant in Denver. An insurance agent commenced writing insurance for the predecessor on January 15, 1935, covering shipments of tires from Denver to Chicago. A former traffic manager for Armour and Company at its Denver plant from 1931 to 1944 first knew the predecessor in 1932, personally assisted him in drawing up the original written contract with Gates in 1936, and recalls that the predecessor transported tires for Gates.

We are of the opinion, despite the fact that much of the evidence concerns incidents occurring over 20 years ago, that the record is convincing that Montgomery or its predecessor was engaged in the operations as set forth in paragraph 5 of appendix C on and prior to July 1, 1935, and have been so engaged continuously since. We do not agree that in the circumstances here present the oral testimony pertaining to the considered operations is insufficient to warrant the relief sought. Although the records pertaining to the services conducted on and before the effective date have been destroyed, we cannot see any compelling reason why the predecessor should have retained them. We believe that the nine witnesses testifying on behalf of petitioner gave a total picture of petitioner's operations before, on, and since July 1, 1935, and we conclude that they were qualified to testify concerning the facts with respect to the considered operations. See *Beatty Motor Exp., Inc.—Modification of Permit*, 71 M.C.C. 307. Some of the protestants also argue that the examiner erred in not allowing certain letters to be admitted into evidence. However, protestants' petition to admit these letters was denied by order of July 28, 1958, and we see no reason for granting the relief here sought and there denied.

One other matter requires a brief comment. Some of the protestants argue that the authority granted should be limited to service between Denver and Chicago restricted to pickup or delivery at the site of the Gates plant at Denver. However, we believe that the evidence is convincing that other points beside Denver and Chicago were served by Montgomery and its predecessor. We also see no justification for restricting the services concerned from and to the Gates plant at Denver. We believe that

the modified authority would not have been so restricted if included in the original permit issued pursuant to the determination of the "grandfather" application, and see no compelling reason to do so now. We therefore conclude that Montgomery's present authority should be modified to the extent recommended by the examiner, to include the authority as indicated in paragraph 5 of appendix C.

THE CONVERSION PROCEEDING

Montgomery's operations between July 1 and August 31, 1957, were substantially as authorized under its outstanding permit; during this period it had effective continuing contracts with 12 different shippers. The contract with Gates was considered by Mongomery to be within its authority to perform service under contracts with persons who operate wholesale or retail department stores. Montgomery operates numerous units of equipment, none of which is assigned for the exclusive use of any shipper. Its services do not appear designed to meet the distinct need of any particular customer, and subject only to shipper acceptance of its charges, its service is available to any member of the shipping public having shipments moving within the scope of its authority. Certain of Montgomery's authorities, as indicated in appendix A, contain Keystone restrictions limiting service to shippers of a certain class.

We are of the opinion that, testing applicant's operations by the amended definition of a contract carrier as set forth in section 203(a)(15), it fairly appears that they do not meet the criteria contained in the amended definition and do not conform thereto. We do not agree with some of the protestants who argue that conversion should not be authorized, because applicant did not prove "operations" on August

22, 1957. "Operations" clearly contemplates the overall business of, and service rendered by, the contract carrier on the critical date, and not the mere physical operations performed on that single day. In the light of the facts of record, including the nature of the commodities described in applicant's permit, its holding out to the public generally, its method of operation, and the number of persons it serves, it is clear that its operations were, on August 22, 1957, that of a common and not a contract carrier.

There remains for consideration the questions whether there should be conversion of portions of applicant's operating authority that are dormant; whether restrictions against interchange and tacking should be imposed; and whether the certificate issued herein should eliminate so-called Keystone restrictions. In *T. T. Brooks Trucking Co., Inc., Conversion Application,* 81 M.C.C. 561, hereinafter called the *Brooks* case, the Commission concluded that where only portions of a carrier's operating authority are dormant, the determination of the carrier's status should be made from a consideration of its overall activities and conversion authorized where such operations are found to be those of a common carrier. Since Montgomery's overall operations actually conducted on August 22, 1957, entitle it to conversion, the certificate issued herein will authorize the performance of the transportation service authorized by the permit outstanding on that date.

In the *Brooks* case it was also concluded that restrictions against interchange of traffic should not be imposed in certificates granted to converted carriers in section 212(c) proceedings. The right of interchange was there held to be a privilege stemming from and incidental to a converted carrier's new common-carrier status and not a result of a restatement

of the operating authority previously held as a contract carrier. Accordingly, no restriction against interchange of traffic with other common carriers will be imposed in the grant of authority herein. It was found, however, in the *Brooks* case that where the possibility of tacking separately stated operating rights exists, restrictions against such joinder should be imposed in all certificates issued pursuant to section 212(c) proceedings. Under the circumstances, and in view of tacking possibilities in Montgomery's permit, a restriction against such joinder will be imposed in the grant of authority herein.

The *Brooks* case also held that in instances where Keystone restrictions appear in the permits of carriers who are to be converted, the certificates to be issued in lieu thereof should contain terms which will continue, to some extent, at least, the effectiveness of such restrictions. It is considered inappropriate, however, to confine Montgomery's service to establishments of "persons" who operate particular businesses. Rather, its service will be restricted to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract as indicated in appendix C herein. This will enable it to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier thereby insuring substantial parity between the permit and certificate authority.

One other matter deserves our attention. Certain protestants argue on exceptions that since Montgomery and its predecessor have transported products for Gates, without specific authority, that this precludes a finding that its operations have been "otherwise lawful" as required for conversion by section 212(c). In view of our finding herein in the "grand-

father" proceeding that Montgomery is entitled to authority to conduct such operations under the "grandfather" provisions of the Transportation Act of 1935, a finding that such operations conducted since that time were lawful appears to be justified.

FINDINGS

In No. MC–72273, we find that on and continuously since July 1, 1935, Joseph Burton Montgomery, doing business as Montgomery Transfer, was, and that he and his successor J. B. Montgomery, Inc., have been, engaged continuously since, in bona fide operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, of the commodities and from and to the points, and in the manner set out in paragraph 5, of appendix C hereto; that by reason thereof J. B. Montgomery, Inc., is entitled to an amended permit authorizing continuance of such operations in addition to those heretofore authorized; that, in the light of the finding herein in No. MC–72273 (Sub-No. 3), that J. B. Montgomery, Inc., is entitled to a certificate of public convenience and necessity in lieu of its outstanding permit, and the provision therein for the issuance of such a certificate, no amended permit need be issued; and that in all other respects the application should be denied.

In No. 72273 (Sub-No. 3), we find that the operations of applicant on August 22, 1957, did not and presently do not conform with the definition of a contract carrier set forth in section 203(a)(15) of the Interstate Commerce Act; that such operations are those of a common carrier by motor vehicle and are otherwise lawful; that by reason thereof applicant is entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, in interstate or foreign commerce,

of the commodities and from and to the points or territories authorized in its presently held permit, as modified herein in No. MC–72273, as set forth in appendix C hereto, provided, however, that the certificate issued to applicant shall be subject to the condition that the separate authorities contained therein shall not be tacked or joined, directly or indirectly, for the purpose of performing any through service; that an appropriate certificate authorizing such operations should be granted concurrently with the revocation of the permit now held by applicant as described in appendix A hereto; and that, except to the extent granted herein, the authority sought in this conversion proceeding should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, an appropriate certificate will be issued.

An order will be entered denying the authority sought except to the extent granted herein.

COMMISSIONER MURPHY, dissenting in part:

I would deny the petition for modification in the "grandfather" proceeding and limit the conversion to the operations embraced in applicant's presently held permit. While the general oral testimony indicates rather convincingly that petitioner has performed some transportation for the manufacturer of rubber products, it is significant that although petitioner indicated that records were available back to 1942, no documentary evidence in respect of any specific shipments handled for this shipper at any time since the "grandfather" date was submitted. In my opinion, the unsupported general allegations clearly are insufficient to support a finding of continuous bona fide transportation for about 25 years of the additional commodities from and to the points and

areas set forth in appendix B of the report. Moreover, I consider petitioner's contention that it has been transporting rubber products and other items for Gates under the belief that such service was embraced in its authority to transport "such commodities as are usually dealt in, or used by, wholesale and retail department stores," to be completely untenable.

APPENDIX D

PERMIT

No. MC 72273

J. B. MONTGOMERY, INC., COZAD, NEBRASKA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 31st day of August A.D. 1943

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Permit, subject, however, to such terms, conditions, and limitations as are now or may hereafter be attached to the exercise of the privileges herein granted, to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements for the transportation of the commodities indicated and in the manner specified below;

IRREGULAR ROUTES:

Dried beans.

From points and places in Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly

west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials,* and *supplies* used in the conduct of such businesses,

From Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packing house products:

Such commodities are usually dealt in, or used by, meat, fruit, and vegetable packing houses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of

Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

Such commodities as are usually dealt in, or used by, wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

And It Is Further Ordered, That this permit shall be effective from the date hereof and shall remain in effect until suspended, changed, or revoked, as provided in said Act.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(SEAL)

APPENDIX E

Service Date September 21, 1961

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY C–15.3

NO. MC 123639 SUB 2*

J. B. MONTGOMERY, INC.,
DENVER, COLORADO

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 21st day of September, A.D., 1961

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and

* Proceeding was instituted under Section 212(c) of the Act, in No. MC 72273 (Sub 3) for conversion of respondent's contract carrier authority to common carrier authority. Pursuant to the report of the Commission decided September 16, 1960, common carrier operations were authorized, and No. MC 123639 Sub 2 has been assigned thereto.

limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuant of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Dried beans,

From points in that part of Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, to Des Moines, Iowa, and points in that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials and supplies* used in the conduct of such businesses,

From Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with

no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments.

Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products.

Such commodities, as are usually dealt in, or used by, wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving, from, to, or between wholesale or retail department stores.

Such commodities as are usually dealt in by manufacturers of rubber and rubber products,

From Denver, Colo., to Chicago, Ill., and Omaha, Nebr., with no transportation for compensation on return except as otherwise authorized.

Materials, equipment and supplies used by manufacturers of rubber and rubber products,

From Chicago, Ill., and points in Illinois within 100 miles of Chicago, Ill., to Denver, Colo., with no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The separate authorities contained herein shall not be tacked or joined, directly or indirectly, for the purpose of performing any through service.

By the Commission, division 1.

HAROLD D. MCCOY,

(SEAL) Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1963

No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

J. B. MONTGOMERY, INC., *Appellee*

On Appeal from the United States District Court for the District of Colorado

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MOTION TO AFFIRM

CHARLES W. SINGER
33 North LaSalle Street
Chicago 2, Illinois
Attorney for Appellee,
J. B. Montgomery, Inc.

March 6, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 791

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

J. B. MONTGOMERY, INC., *Appellee*

On Appeal from the United States District Court for the District of Colorado

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellee, J. B. Montgomery, Inc. moves that the judgment of the District Court be affirmed on the ground that the questions presented are not sufficiently substantial to warrant further argument.

STATEMENT

This is a direct appeal from the decision and final judgment (J. S. 15, 28; 206 F. Supp. 455) of a District Court of three judges convened pursuant to 28 U.S.C. 2284 and 2325, setting aside certain orders of the Interstate Commerce Commission (Commission) as being beyond its statutory authority; and remanding the cause for further action by

the Commission in accordance with the views expressed in the opinion of the District Court.

This case arises as a result of amendments to the Interstate Commerce Act (Act) enacted by Congress in 1957. This legislation amended the definition of a "contract carrier by motor vehicle" in Section 203(a)(15) of the Act, and added Section 212(c), which provides for the revocation of a contract carrier permit of, and issuance to, any person holding a permit whose operations on the effective date of this subsection (August 22, 1957) did not conform to the amended definition of contract carriage.

Prior to 1957, appellee (Montgomery) held a contract carrier permit authorizing the operations described in App. D, J. S. 42. By an order dated January 3, 1958, the Commission instituted a proceeding under Section 212(c) to determine whether appellee's then outstanding permit should be revoked and a certificate of public convenience and necessity be issued in lieu thereof. Subsequently, as a precautionary measure, appellee filed an application for conversion from contract to common carriage.

While the Montgomery proceeding was pending on exceptions, the Commission issued its report in *T.T. Brooks Trucking Co., Inc. Conversion Application*, 81 M.C.C. 561, which embraced nine other conversion applications and served as the test case for determining issues arising under Section 212(c), including the question of whether converted authorities should continue restrictions limiting service to a particular class of shippers.[1] The Commission concluded that proceedings arising under Section 212(c) should be decided on the basis of the "substantial parity" test applied by this Court in cases arising under the "grandfather" clause of Part II of the Act, i.e. the Motor Carrier

[1] Such restrictions are referred to as "keystone" restrictions, having been first adopted by the commission in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475.

Act of 1935,[2] and that where "Keystone" restrictions appear in the permits of converted carriers the certificate issued in lieu thereof should contain a restriction continuing the effect of the "Keystone" restrictions. As applied to Montgomery, the service was restricted, in the certificate issued, to movements from, to or between outlets or other facilities of the particular businesses of the class of shippers with which it could formerly contract (J. S. 38, 46-48).

Appellee filed a complaint in the District Court to set aside the Commission's order insofar as it limited operating authority to movements from, to or between facilities of a particular class of shippers. The District Court held that a certificate to be issued under Section 212(c) is not subject to the test of substantial parity, and that the Commission was without statutory authority to impose the restrictions in question. Accordingly, the Court set the Commission's order aside and remanded the matter for further action in accordance with the views set forth in its decision.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court, and the decision of the District Court should be affirmed.

Before proceeding with the substance of their argument, appellants suggest that the question in this case is whether the statutory provisions authorize the Commission, in the case of a contract carrier whose commodity authority is defined not in terms of specified commodities but in terms of products customarily handled by particular types of businesses, to impose limitations upon the business facilities to be served which are designed to achieve "substantial parity" between the carriers operations under its old permit and its new certificate.

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[2] *Alton Railroad Co.* v. *United States*, 315 U.S. 15, 22; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475.

This is less a question than a method of circular reasoning. It is well established that *common carriers* whose commodity authority is defined in terms of products customarily handled by particular types of businesses may transport these commodities for other types of business as well. In *Interstate Commerce Commission* v. *Ratner*, United States District Court for the Northern District of Illinois, Eastern Division, decided April 15, 1947, 6 CCH Fed. Car. Cas. II 80.415 (not reported in F. Supp.), it was held that a carrier holding authority to transport "such merchandise as is dealt in by wholesale food business houses" could properly transport beer from a brewery to a beer distributor under such authority because many wholesale food business houses in their normal course of business dealt in and distributed beer, even though the beer distributor in this case was not considered a wholesale food business house.[a]

In *Sanders Extension of Operations*, 47 M.C.C. 210, 214, the Commission applied this principle to a common carrier with a similar commodity description stating that so long as the commodities transported are "such as are dealt in by wholesale and retail grocery stores" the carrier was "free to transport them for any shipper or consignee regardless of the business in which he or it is engaged." To the same effect is *Vidas Contract Carrier Application*, 62 M.C.C. 106, 108.

Thus, in the last analysis, the question as stated by appellants simply resolves itself into whether the "substantial parity" test is valid under Section 212(c).

Appellants' first assertion is that the question is important in the administration of the Act. This is doubtful at best. The issue resolved by the District Court is not one

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[a] The carrier in question was a contract carrier, but its permit did not contain "Keystone" restriction limiting service to a class of shippers.

of continuing interest to either the Commission or the motor carrier industry and the effect of the decision is not prospective in nature. In contrast, the Court has had, and continues to have, before it, a number of cases involving the Commission which are of continuing interest to the industry.[4] See, for examples, *Interstate Commerce Commission* v. *J.T. Transport Company*, 368 U.S. 81 which interpreted the criteria of public interest contained in Section 209(b) of the Act; and No. 125, *United States* v. *New York, New Haven & Hartford Railroad Co., et al.* (Probable jurisdiction noted October 8, 1962, 9 L. ed. 2d 52) which involves an interpretation of the meaning of "unfair or destructive competitive practices" as used in the statement of National Transportation Policy. These decisions will undoubtedly guide the Commission and the industry for a number of years. While it may be, as contended by appellants, that there have been at least 65 conversion proceedings under Section 212(c) in which the certificates issued in lieu of permits contained provisions similar to those in the involved case, many of these carriers have no real interest in the subject and in any event, this, in and of itself, does not make the question substantial. If, as appellants contend, the lack of such a restriction would permit converted carriers to enlarge and expand their business beyond the pattern acquired prior to August 22, 1957, the answer, as the District Court found, is that the enlargement was recognized by Congress and is inherent in the language and legislative history of Section 212(c). (App. A., J.S. 24). The Commission's difficulty is not in administering the Act, but in accepting the fact that it cannot, under the guise of administration, put limitations in the statute not placed there by Congress. *Colgate Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355.

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[4] As of February 27, 1963, there were 11 cases pending before this Court involving decisions of the Interstate Commerce Commission.

Appellants next argue (J. S. 10-14) that the Commission has statutory authority to impose such restrictions, supported by the language and legislative history of the Act and the decisions of this Court interpreting the "grandfather" provisions of the Motor Carrier Act. This argument is answered effectively in the decision of the District Court (App. A, J.S. 22-23), and in the last analysis the soundness of that decision can be determined without any further proceedings before this Court.

The language of the "grandfather" clause of the Motor Carrier Act differs significantly from Section 212(c), and the decisions of this Court that the original clause was designed to insure substantial parity between future operations and prior bona fide operations are based on the language of that part of the statute. By contrast, Section 212(c) specifically states that the Commission "*shall* authorize the transportation of the *same* commodities between the *same* points or within the same territory *as authorized in the permit*". (Emphasis added).

Appellants' rely in part on two decisions of the District Court for the District of New Jersey (J. S. 11) which have little or no applicability. In *Tar Asphalt Trucking Co., Inc. v. United States*, 208 F. Supp. 611, 614, plaintiff's primary objective was to remain a contract carrier, and the substance of its complaint was that the Commission improperly found its operations to be those of a common carrier, resulting in its involuntary conversion. Plaintiff's objection to the restriction against tacking was an alternative objection in the event its conversion was found to be proper. Plaintiff argued that the restriction would amount to discrimination between it and existing common carriers who are permitted to tack, and to a denial of equal protection of the law. The Commission did not argue the point in these terms, but referred to its opinion in the *Brooks* case, *supra* and contended that the restriction was necessary to accomplish substantial parity. The Court adopted the Com-

mission's views without commenting specifically on plaintiff's contentions. The basic issue of the *validity* of the "substantial parity" test in connection with section 212(c), was not effectively developed in the case, and it is doubtful that the question, as such, was even before the Court. The jurisdictional statement of this appellant in No. 762, this Term, does nothing to recast the issues. *P. Saldutti & Son, Inc.* v. *United States*, 208 F. Supp. 611, is not in point. The issues in that case have nothing in common with those presented here and the Court's remark (quoted out of context) is dicta.

That the restriction may be viewed as an exercise of the Commission's power under Section 204(b) is certainly a questionable hypothesis. The Act provides for only two classes of for hire motor carriers, contract and common, and any classification or grouping which the Commission is authorized to establish must fall within these two classes. It has no authority to create a hybrid class of carriers which is something more than contract carriers and something less than common carriers. Since the basic purpose of Congress was to permit contract carriers whose activities did not conform with the new definition of contract carriage to continue their existing operations as common carriers, they should have the same rights, and accompanying duties, as other common carriers. The basic fallacy with appellants' reasoning is that they would label converted carriers as common carriers for convenience, but would have them continue to operate with the same restrictions which attached to their former status as contract carriers. While appellee considers the appellants' position in this respect to be untenable, it should be noted that this point was not raised timely by appellants before the District Court, and, in our view should not be considered. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33.

The suggestion that it is not unreasonable to read into Section 212(c) by implication the provisions of Section

208(c) (J.S. 14) is far-fetched to say the least. Section 208(c) by its very terms refers only to certificates issued under Sections 206 or 207; and neither the language nor the legislative history of Section 212(c) remotely suggests that Congress intended Section 208(c) to be applied in connection with Section 212(c).

In answer to the remainder of appellants' arguments, it should be emphasized that while the District Court recognized that a possible broadening of the activities of a converted carrier is inherent in the language and legislative history of Section 212(c), it also recognized that the Commission had applied this section to impose territorial restrictions beyond those contained in the permit. For example, as pointed out to the District Court, appellee as a contract carrier under contracts with wholesale and retail department stores was authorized to transport any commodity dealt in by its contracting shippers from to or between any point within its authorized territory, irrespective of whether the movement was from, to or between a facility of a wholesale or retail department store. As a common carrier, however, it would be limited, even when serving a wholesale or retail department store, "to shipments moving from, to or between wholesale or retail department stores". Thus, as examples, appellee as a common carrier, under the restrictions imposed by the Commission, would be prevented, among other things, from performing any service from a supplier of a department store to its customer, from a public warehouse to a customer, from one public warehouse to another public warehouse, or from a supplier or public warehouse to a consolidation or transfer point. The restrictions imposed on the other converted authorities of appellee have the same diminishing effect. Actually, the restriction can act as both a commodity and territorial limitation, and as such deprives appellee of a substantial right which it held prior to conversion. The Commission cannot apply Section 212

(c) to deprive a carrier of rights held prior to its conversion under any theory of statutory interpretation.

It is regrettable, but true, that the Commission on the basis of alleged legislative intent has consistently and erroneously tried to over-regulate contract carriers. From this standpoint it has usually been proven wrong. In fact, the impetus for the 1957 amendments came from this Court's decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409. Prior to this decision the Commission regarded the legitimate purpose of a contract carrier as being to furnish a specialized and individual service which is required by the peculiar needs of a particular shipper and which a common carrier, because of its obligations to the general public, could not undertake to supply. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 498; *Craig Contract Carrier Application*, 31 M.C.C. 705, 712. Ultimately, the Commission arrived at the conclusion that specialization in respect to shippers served was evidenced or negatived by the number served. *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 396. In *United States* v. *Contract Steel Carriers*, *supra*, this Court found that if specialization was to be read into Section 203(a)(15), it was satisfied that the service was specialized, since the carrier was authorized to haul only a limited types of steel products and did so under individual and continuing contractual arrangements with a comparatively small number of shippers (69) throughout a large area. It specifically held that "A contract carrier is free to aggressively search for new business within the limits of his license."

After the 1957 amendments, the Commission attempted to perpetuate its practice of denying contract carrier applications under Section 209(b) on the basis of the adequacy of existing common carrier service. In *Interstate Commerce Commission* v. *J. T. Transport Company*, *supra*, this Court ruled that the Commission's approach was improper,

and that the standard under the amended version of this section was not whether existing services are reasonably adequate, but whether a shipper has a distinct need for a different or more select service. The case was remanded for further consideration. While the Commission is often regarded as one of the most able administrative agencies, it also has a history of resisting legislative change, and its attempts to circumscribe contract carriage have met with numerous judicial rebuffs.

The arguments advanced by appellants are designed to overcome past failures to recognize and accept legislative change. The Commission has never quite accepted the 1957 amendments as a change, but has tended to regard them as merely an affirmation of its practices. While this Court has not had occasion to pass on a case arising under Section 212(c), it has recognized that these amendments were intended to and did change the status quo, and this view is implicit in the District Court's opinion.

The question presented is one of statutory interpretation. Although the legislation involved is important, the questions presented are not so substantial as to warrant further consideration by this Court. In amending the Act, Congress expressed itself clearly, and set forth definite standards for converting contract carriers who did not meet the amended definition. Instead of following the language and legislative intent of the statute, the Commission erroneously has attempted to interject its own standards; and the District Court has clearly recognized this fact. The District Court has interpreted the statute involved in accordance with well established principles of statutory construction. In our opinion, no novel or unusual questions are presented to this Court, such as would require further argument.

We respectfully submit that the decision below is correct, and that appellants present no substantial question for the

decision of this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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Chicago 2, Illinois
Attorney for Appellee,
J. B. Montgomery, Inc.

March 6, 1963

Proof of Service

I, CHARLES W. SINGER, attorney for J. B. Montgomery, Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the fifth day of March, 1963, I served copies of the foregoing Motion to Affirm on the several parties thereto, as follows:

1. On the United States by mailing copies in duly addressed envelopes with first class postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; Lee Loevinger, Esq., Assistant Attorney General, Department of Justice, Washington 25, D. C.; Robert B. Hummel, Esq., Attorney, Department of Justice, Washington 25, D. C., Elliott H. Moyer, Esq., Attorney, Department of Justice, Washington 25, D. C., and Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D. C.; and to Lawrence M. Henry, Esq., United States Attorney for the District of Colorado, Denver, Colorado, with air mail postage prepaid.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert W. Giannane, Esq., its Chief Counsel, Interstate Commerce Commission, Washington 25, D. C., and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D. C.

CHARLES W. SINGER, *Attorney for* J. B. Montgomery, Inc.

address: 33 North LaSalle Street
Chicago 3, Illinois

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 66

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

J. B. MONTGOMERY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 63–73) is reported at 206 F. Supp. 455. The report of the Interstate Commerce Commission (R. 36–46) appears at 83 M.C.C. 457.[1]

JURISDICTION

The judgment of the district court was entered on July 10, 1962 (R. 74), and the United States and the

[1] The report of Division 1 of the Commission involved two proceedings: MC–72273, *Modification of Permit*, and MC–72273 (Sub-No. 3), *Conversion Application*. Only the Commission's order in the conversion proceeding is involved in this appeal.

Interstate Commerce Commission filed notices of appeal on September 7, 1962 (R. 75–79). This Court noted probable jurisdiction on March 25, 1963. 372 U.S. 952. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Whether the Interstate Commerce Commission, in converting a motor carrier's contract carrier permit to a common carrier certificate under the "grandfather" provision of Section 212(c) of the Interstate Commerce Act, may limit the carrier to serving the outlets of particular types of businesses, in order to insure substantial parity between the carrier's new authority and its authority under the prior permit.

STATUTE INVOLVED

Sections 203(a)(15), 204(a)(6), 208(a), and 212(c) of the Interstate Commerce Act, 49 U.S.C. §§ 303(a)(15), 304(a)(6), 308(a), and 312(c), are set forth in the Appendix, *infra*, pp. 39–41.

STATEMENT

Prior to 1957, the appellee, J. B. Montgomery, Inc., was the holder of a contract carrier permit authorizing extensive operations in a broad geographical area.[2]

The permit (R. 7–9) did not itemize the particular commodities which the carrier could transport, but identified them by the business which dealt in or used

[2] That permit was issued to Montgomery's predecessor in interest on August 31, 1943, under the "grandfather" clause of the Motor Carrier Act of 1935, 49 Stat. 543, 552, 49 U.S.C. 309(a).

them. Thus the permit authorized Montgomery to transport:

> (1) Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, equipment, materials, and supplies used in the conduct of such businesses.
>
> (2) Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packing houses.
>
> (3) Such commodities as are usually dealt in, or used by, wholesale and retail department stores.

The permit also contained a "Keystone restriction" which limited Montgomery to transporting only under contracts with persons operating the businesses specified (R. 47–48). The net result was that Montgomery was authorized to carry a relatively wide variety of commodities, but only for a limited class of shippers.

After the 1957 amendments to the Motor Carrier Act (see, *infra*, pp. 40–41), and in accordance with new Section 212(c) of the Act (49 U.S.C. 312(c)), the Commission instituted a proceeding to determine whether respondent's operations were such as to require the conversion of its contract carrier permit into a common carrier certificate. Montgomery subsequently filed an application for conversion of its permit to a certificate, and various carriers intervened in opposition to the conversion.

After full administrative proceedings, the Commission (Division 1) held that Montgomery's operations did not conform to the amended definition of a con-

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tract carrier, revoked its permit, and issued to it a common carrier certificate. The certificate, like the prior permit, described the commodities to be carried in terms of the products customarily dealt in or used by various specified types of businesses, such as packing-houses and department stores. In order to enable Montgomery "to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier thereby insuring substantial parity between the permit and certificate authority," the Commission stated that it would confine the carrier's authority "to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract" (R. 44). More specifically, the certificate limits Montgomery to providing service on such commodities "to shipments moving from, to, or between wholesale and retail" outlets and stores (R. 50–51).[1]

Montgomery filed suit in the district court to set aside the Commission's order only insofar as it limited the operating authority to movements from, to, or between facilities of particular types of businesses. The district court held the Commission "was without statutory authority to impose the restrictions in ques-

[1] The Commission also imposed in Montgomery's certificate a restriction against the combination of its various operating rights in order to render a through service (a practice known in the industry as "tacking") (R. 43). That restriction, which was approved by this Court in *Tar Asphalt Trucking Co.* v. *United States*, 372 U.S. 596, was not challenged in the district court. The Commission rejected the proposal of the intervenors that a restriction should be imposed upon Montgomery's right to "interchange of traffic with other common carriers" (R. 43).

tion," set aside the Commission's order, and remanded the case for further proceedings (R. 73). In the district court's view, the Commission has no authority "to impose restrictions to accomplish 'substantial parity' between past and future operations" (R. 72).

SUMMARY OF ARGUMENT

At the outset, we develop the background of Section 212(c) of the Interstate Commerce Act. We note the Commission's efforts to confine contract carriers' operations within relatively narrow limits, this Court's ruling in *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409, and, finally, the Congressional resolution of the problem in 1957. Focusing on the so-called Keystone restriction, we show that, before this case, the Commission adopted the practice, followed here, of continuing the effects of the restriction after conversion of the carrier's permit into a certificate of common carriage.

The Commission's position is that Section 212(c), read in the light of its background, must be viewed as a "grandfather" clause. Its purpose was merely to continue, without expanding, the authority of those contract carriers whose operations were lawful under this Court's *Contract Steel Carriers* decision but which no longer fitted the new definition of contract carriage. As we develop at some length, the solution adopted with respect to Keystone restrictions serves this objective by achieving "parity" between the scope of the former permit authority and the new certificate authority.

The objection is made that by specifying a continuance of the commodity and territorial limitations, Congress indicated its unwillingness to have other restrictions imposed on the former contract carriers after conversion of their permits into common carrier certificates. We believe, however, that the language of Section 212(c) cannot be read so narrowly. On the contrary, the injunction that the new certificate "shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit" may reasonably be construed as requiring that the effects of the Keystone restriction be carried forward. But, even if the terms "commodities" and "territory" are to be read more grudgingly, it does not follow that the Commission cannot impose additional restrictions. For, so long as the carrier's authority in these respects is carried forward, the Commission remains free to exercise its general power, under other sections of the Motor Carrier Act, to confine operations within proper limits.

Finally, we show that the restriction imposed here is not inconsistent with the new status of the operator as a "common carrier." Recognizing that the former contract carrier was intended to become, by conversion, a full-fledged common carrier, the limitation in suit is fully justified. The restriction here involved is, as we demonstrate, much like the so-called "intended use" and "plant-site" restrictions commonly attached to common carrier certificates.

ARGUMENT

INTRODUCTION

1. Under the scheme of the Motor Carrier Act all motor carriers for hire are either "contract" or "common" carriers.[4] By definition, the common carrier "holds [him]self out to the general public" as able and willing to transport stated classes of passengers or goods. Section 203(a)(14), 49 U.S.C. 303(a)(14). To operate, he must obtain a certificate which, as to new carriers, is issued only if the "public convenience and necessity" require it. Sections 206–207, 49 U.S.C. 306–307. The routes, the rates, and the service of common carriers are fully regulated. Sections 204(a)(1), (4a), 208, 216–217, 49 U.S.C. 304(a)(1), (4a), 308, 316-317. The common carrier cannot refuse anyone he is licensed to serve, nor can he discriminate in his charges. Sections 216(d), 217(b), 49 U.S.C. 316(d), 317(b). By contrast, the contract carrier has traditionally been free to serve whom he will, charging what he pleased, discriminating between customers if he chose. While the contract carrier has been increasingly subjected to regulation,[5] he has remained

[4] The Act also defines, and provides for limited regulation of, "private carriers" who carry their own goods in connection with commercial transactions. See Sections 203(a)(17), 203(c), 204(a)(3), 49 U.S.C. 303(a)(17), 303(c), 304(a)(3).

[5] The 1957 amendments, later discussed, articulated stricter standards for the issuance of contract carrier permits and restricted operations thereunder. See Section 209(b), as amended, 71 Stat. 411, 49 U.S.C. 309(b). The same year, contract carriers serving more than one shipper were required to publish and adhere to *actual* rate schedules, rather than *minimum* rate schedules. See Section 218(a), as amended, 71 Stat. 343, 49 U.S.C. 318(a).

largely immune from the duties and controls imposed on common carriers. This relative freedom from regulation was justified on the ground that contract carriers perform essentially specialized services for a limited group of shippers, so that their activities do not affect the public at large or place them in real competition with common carriers.

With respect to contract carriers, the Commission's primary concern has been to prevent an undue expansion or generalization of operations. In a series of cases the Commission emphasized its view that contract carriers were restricted to specialized service. See *Pregler Extension of Operations*, 23 M.C.C. 691; *Craig Contract Carrier Application*, 31 M.C.C. 705; *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383. In appropriate circumstances, permits were limited by the so-called "Keystone" restriction which authorized a broad transportation service for only a *limited class of shippers*. See *Keystone Transportation Co. Contract Carrier Application*, 19 M.C.C. 475. In *Noble* v. *United States*, 319 U.S. 88, this Court specifically approved the imposition of "Keystone" restrictions.

Over the years, however, it became increasingly difficult for the Commission to maintain the basic distinctions between contract and common carriage. The former statutory definition of "contract carrier" was not very helpful. It characterized the contract carrier as one other than a common carrier who transports passengers or goods "under individual contracts or agreements." 54 Stat. 920. Moreover, the Act expressly guaranteed each contract carrier the right to

expand its operations by securing additional contracts or increasing its equipment "within the scope of [its] permit." 49 Stat. 553. Finally, in *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409, this Court disapproved the Commission's efforts to check what it viewed as undue expansion of contract carrier operations, holding that, not only could no limit be set on the number of contracts, but contract carriers were free to search aggressively for new business within the scope of their licenses.

In the face of this decision, the Commission recommended legislation to deal with the problem. The Commission's 70th Annual Report stated (pp. 162–63):

> We recommend (1) that the definition of contract carrier by motor vehicle as set forth in section 203(a)(15) be amended so as to state clearly the nature of the services which may be performed by such carriers and to provide that such services may be performed under continuing contracts for only one person or a limited number of persons, and (2), if so amended, that section 212 be amended by adding a new paragraph (c) authorizing the Commission to revoke the permit of such a carrier and to issue in lieu thereof a certificate of public convenience and necessity if it finds, after a hearing, that the operations of the permit holder are not those of a contract carrier under the revised definition, are those of a common carrier, and are otherwise lawful.
>
> * * * * *

The Commission's recommendation was incorporated into drafts of bills introduced at the request

of the Commission in February, 1957 (H.R. 5123 and S. 1384, 85th Cong., 1st Sess.). On August 8, 1957, the bill was considered and passed by the Senate. At that time, Senator Smathers of the Senate Committee explained the purpose of the measure (103 Cong. Rec. 14035–6):

> The legislation embodied in S. 1384 undertakes to solve one of the difficult problems facing the Interstate Commerce Commission in recent years—that of determining the line of demarcation between contract and common carriers by motor vehicles. Because the Commission is now specifically prohibited from restricting contract carriers from substituting or adding contracts within the scope of their permits, a substantial number of contract carriers have been able to enter into so many contracts that they are actually performing common-carrier service. Unlimited diversion of traffic from common carriers to contract carriers could impair the common carriers' ability to render adequate service to the general public; consequently, a more precise definition of contract carriage in the Interstate Commerce Act is deemed necessary.
>
> * * * * *

As finally adopted, the new definition of "contract carrier" provides (Section 203(a)(15), 49 U.S.C. 303(a)(15)):

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception

> therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

The role of contract carriers as furnishers of specialized services was now made clear. And, for the first time, it was explicitly stated that contract carriers could transport only under "*continuing* contracts" with "a *limited* number of persons." To make the restriction plain, Section 209(b) of the Act was amended so as to withdraw, for the future, the former right to expand operations indefinitely. See 71 Stat. 411, 49 U.S.C. 309(b).[6]

With respect to existing permittees, the following provision was adopted (Section 212(c), 49 U.S.C. 312(c)):

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a per-

[6] The history of other aspects of the 1957 amendments was canvassed by the Court in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, 85–93.

> mit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

2. The present case involves an application of the conversion provision just quoted. It is conceded that respondent's operations "do not conform with the [present] definition of a contract carrier," "are those of a common carrier," and "are otherwise lawful." Accordingly, Montgomery is plainly entitled to certification as a common carrier. And the certificate, it is clear, must embody the same territorial and commodity authority as the prior permit. The question here is whether the effects of the Keystone restriction of the permit—limiting respondent to transportation under contracts with hardware and automobile accessory business houses, meat, fruit and vegetable packing houses, and department stores—shall be carried forward in the certificate in some appropriate manner.

The problem is not new to the Commission. The matter was fully canvassed in *T. T. Brooks Trucking Co., Inc., Conversion Application*, 81 M.C.C. 561 (1959). The Commission there consolidated for consideration and decision ten applications by contract carriers for conversion to common carrier status under section 212(c). Besides the applicants, numerous protestants and the Contract Carrier Conference and the Regular

Common Carrier Conference appeared. All parties diligently applied themselves to assisting the Commission in resolving for the present and future administration of section 212(c) several issues raised by the conversion of contract carrier permits into common carrier certificates. The solution ultimately evolved is accordingly entitled to special weight.

In the course of its opinion in *Brooks*, the Commission discussed the purpose of the new conversion provision at some length and concluded (81 M.C.C. 571):

> In view of the utilization of the substantial parity test in the past, and in the absence of any congressional expression to the contrary, we are constrained to hold here that the so-called "grandfather" clause contained in section 212(c) should be administered on the basis of a "substantial parity" test with respect to the conversion of *operating authorities* involved therein. When so applied, it is obvious that the certificates issued to converted carriers should authorize the transportation of the same commodities to and from the same points and (in the case of carriers with territorial grants) within the same territories for which they now hold permits, so as to insure that nothing commoditywise or territorially would be taken away from the converting carrier. By the same token, this does not mean that the converted carrier should be granted authority, which by reason of being denominated a certificate instead of a permit, would authorize service so far beyond the scope of its previously authorized service that the test of "substantial parity" would be nullified. In other words,

mere conversion should not create for a converted carrier new common-carrier operating rights which are not substantially similar, with respect to commodities and territory, to those intrinsic in its old status or which are not within the normal operating framework of its existing permits.

The Commission then turned to the specific problem of Keystone restrictions (81 M.C.C. at 575–576):

A Keystone restriction in a contract carrier's permit limits not the commodities which may be transported or the territory which may be served, but the persons or class of persons with whom the carrier may enter into transportation contracts. Such restrictions take their names from the application proceeding in which they were first imposed, *Keystone Transp. Co. Contract Carrier Application,* 19 M.C.C. 475, and our power to impose them was affirmed by the Supreme Court in *Noble* v. *United States,* 319 U.S. 88. The Keystone restriction was devised in order to enable this Commission to grant contract-carrier authority which was at once broad enough, with respect to the commodities authorized, to enable the carrier to provide a complete service for the shippers which it served, and, at the same time, would tie the carrier down to service for one specific industry or type of business enterprise, thus affording protection to carriers serving other classes of shippers from unwarranted competition.

Womeldorf is the only applicant here whose permits contain Keystone restrictions. He is authorized to transport (1) such commodities as are dealt in by chain retail 5-cent-to-1-dollar

stores or stores of like character, restricted to service under special and individual contracts with persons who operate chain retail 5-cent-to-1-dollar stores, the business of which is the sale of general merchandise, and (2) such commodities as are sold in, or used in connection with, the operation of gasoline service stations, with certain exceptions, under contracts with persons, the principal business of which is the production, sale, and distribution of petroleum products. The examiner recommended that in lieu of Womeldorf's variety store permits, certificates be issued authorizing the transportation of the same commodities named in the permits but "limited to the transportation of shipments moving from, to, or between warehouses or retail stores of persons * * * who operate retail stores for the sale of general merchandise;" and that his service-station authority be "limited to the transportation of shipments moving from, to, or between refineries, warehouses, or gasoline service stations of persons whose principal business is the production, sale, or distribution of petroleum products."

Womeldorf and the Contract Carrier Conference contend that the continuation of any such limitations in the converted authority is improper (1) because they were intended to protect common carriers from the competition of contract carriers and, therefore, the reason for their imposition will no longer exist when the contract carrier itself becomes a common carrier, and (2) because a restriction limiting the type of shipper which may be served would be inconsistent with the obligation of a common carrier to hold out its service to the entire

shipping public. The Common Carrier Conference says that the effect of Keystone restrictions should be maintained by the imposition of appropriate limitations in the certificates issued to converted carriers. They assert, however, that the examiner erred in limiting Womeldorf's operations under his variety store authority to the transportation of shipments moving from, to, or between establishments of persons who operate retail stores for the sale of general merchandise, instead of restricting them to service at establishments of persons who operate retail chain 5-cent-to-1-dollar stores.

We conclude that in instances where Keystone restrictions appear in the permits of carriers who are to be converted the certificates to be issued in lieu thereof should contain appropriate terms which will continue to some extent, at least, the effectiveness of the Keystone restrictions. Only in this way can substantial parity between the old and the new operating authorities be maintained. We do not think, however, that the form of restriction which the examiner recommended to be imposed in Womeldorf's certificate is appropriate, referring, as it does, to service at establishments of "persons" conducting a particular type of business. Rather, we shall restrict Womeldorf's variety store authority to the transportation of such merchandise as is dealt in by retail chain 5-cent-to-1-dollar stores when moving to, from, or between the warehouses or retail outlets of such stores; and we shall limit his gasoline service station authority to the transportation of such commodities that are sold in, or used in connection with, the operation of gasoline serv-

ice stations when moving from or to the warehouses, plants, or other facilities of producers or distributors of such commodities. These restrictions or limitations are, in part, in the nature of and similar to the form of grants of territorial authority occasionally found in common-carrier certificates in which service is authorized at specified plant sites. They will enable Womeldorf to furnish substantially the same transportation service as a common carrier that he is now authorized to provide as a contract carrier, and will accomplish what we conceive to be the purpose of the statute, namely, to attain substantial parity between the permit and certificate authority. What has been concluded here as to the exact type of restriction or limitation to be imposed is based on the facts before us, and the language employed in limitations placed in certificates issued by us in other section 212(c) proceedings will depend on the form the restrictions take in the existing permits which are being considered.

The Commission's order in the *Brooks* case, determining that it was necessary to continue, to some extent, the effects of the Keystone restriction in the license of converted carriers, is the landmark decision in this field. We submit it represents a fair and reasonable solution to several of the problems arising in the administration of Section 212(c).[7]

The identical solution was followed here. Thus, respondent's former permit as a contract carrier au-

[7] For a discussion of the Keystone restriction problem in conversion cases arising under Section 212(c), see Note, 107 Pa. L. Rev. 1150, 1170–1173 (1959).

thorized it to transport, between stated points, "[s]uch commodities as are usually dealt in, or used by, wholesale and retail department stores" only "*under * * * contracts or agreements with persons * * * who operate wholesale or retail department stores, the business of which is the sale of general merchandise*" (R. 8–9). And the corresponding provision of the new common carrier certificate authorizes the transportation of the same commodities between the same points, "*restricted to shipments moving, from, to, or between wholesale or retail department stores*" (R. 58).[8]

The practical effect of the new provision is to eliminate the restriction as to the shippers whom the carrier may serve, which as the Commission noted (R. 44, 83 M.C.C. 463) would be "inappropriate" in a common carrier certificate, while retaining the limitations which the Keystone restriction had in fact imposed on the commodities, territory, and service authorized by the permit. The only question here is whether the Commission's announced purpose of carrying forward those limitations after conversion is authorized by Section 212(c).

I. THE RESTRICTION IMPOSED EFFECTUATES THE POLICY OF SECTION 212(C) AS A "GRANDFATHER" CLAUSE

Its history makes it clear that Section 212(c) was intended by Congress as a "grandfather" clause. It

[8] Identical Keystone provisions with respect to respondent's authority to carry hardware and automobile accessory business house goods and commodities handled by meat, fruit and vegetable packing houses (R. 8) were similarly carried forward by restricting the certificate to shipments to or from the outlets of such businesses (R. 57–58).

was described as a grandfather clause in the Commission's 70th Annual Report, which was the genesis of the entire statute;[9] it was referred to as such by the Chairman of the Commission in his presentation of the bill before the Senate Committee;[10] in the hearings before the Senate Committee, references to the bill as a grandfather clause were made by representatives of both the Common Carrier Conference[11] and the Contract Carrier Conference[12] of the American Trucking Associations; and it was so described by the House Committee on Interstate and Foreign Commerce.[13] The Commission, as we have seen, so viewed it in the first of the conversion cases to be decided under Section 212(c). *T.T. Brooks Trucking Co., Inc., Conversion Application,* 81 M.C.C. 561.

The characterization of Section 212(c) as a grandfather clause is revealing. Over the years the phrase has acquired a distinct meaning in the regulation of transportation. Cf. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Implicit in the concept of a grandfather clause is the duty of the Commission to administer the statute according to the concept of substantial parity. *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 480–81; *Alton R.R. Co.* v.

[9] 70th Annual Report of the Interstate Commerce Commission, p. 163.

[10] Hearings before a Subcommittee of the Senate Interstate and Foreign Commerce Committee on S. 1384, etc., *Surface Transportation—Scope of Authority of ICC*, 85th Cong., 1st Sess. (1957) at 24, 28.

[11] *Id.*, at 345.

[12] *Id.*, at 299.

[13] H. Rep. No. 970, 85th Cong., 1st Sess., at p. 4.

United States, 315 U.S. 15, 20–24; *Howard Hall Co.* v. *United States*, 315 U.S. 495, 498–99. The Commission was accordingly justified in concluding that Section 212(c) contemplates the issuance of a certificate which "insure[s] that nothing commoditywise or territorially would be taken away from the converting carrier," and which at the same time does not "by reason of being denominated a certificate instead of a permit * * * create for a converted carrier new common-carrier operating rights which are not substantially similar, with respect to commodities and territory, to those intrinsic in its old status or which are not within the normal operating framework of its existing permits." *T. T. Brooks Trucking Co., Inc., Conversion Application*, 81 M.C.C. 561, 571.

The propriety of administering Section 212(c) according to the concept of substantial parity has been recognized by the United States District Court for the District of New Jersey in a decision affirmed by this Court, *Tar Asphalt Trucking Co.* v. *United States*, 208 F. Supp. 611, 614, affirmed *per curiam*, 372 U.S. 596.[14] The Commission had inserted in the certificate issued to the converted carrier a prohibition against "tacking" of operating authorities,[15] a practice forbidden to

[14] However, as we pointed out in our Motion to Affirm filed in the *Tar Asphalt* case, the Court's affirmance of that decision is not necessarily conclusive of the present case, for the imposition of the no-tacking restriction there involved could also be justified on the ground that the absence of such restriction would result in authorization to operate between points *not* authorized by the permit, contrary to the literal wording of the statute.

[15] "Tacking" is a practice by which a carrier which holds authority to transport commodities between points *A* and *B*, and

contract carriers,[16] reasoning that the conversion of the permit into a certificate should not so greatly expand the carrier's permissible scope of operations. In affirming, the district court said:

> The purpose of the limitation contained in that proviso is obviously to maintain substantial parity with the operating authority contained in Tar Asphalt's contract carrier permit, and is in accord with the legislative intent implicit in Section 312(c) of the Act which provides for "the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit" * * *. See *Crescent Express Lines, Inc.* v. *United States*, 1943, 320 U.S. 401. * * * The contemporaneous construction of the Act by the Commission in this regard, as set forth in its decision in T. T. Brooks Trucking Co., Inc., Conversion Application, 81 MCC 561 (1959) is entitled to great weight. *United States* v. *American Trucking Associations*, 1940, 310 U.S. 534 * * *. We accept it as a well reasoned authority.

Subsequently, in *P. Saldutti and Son, Inc.* v. *United States*, 210 F. Supp. 307, 314, the same district court,

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a separate authority to transport the same commodities between *B* and *C*, combines the two authorities and offers a through service between *A* and *C*.

[16] See, *e.g.*, *Emery Transportation Co.* v. *United States*, 91 F. Supp. 644, 646 (S.D. Ohio), affirmed *per curiam*, 339 U.S. 955. Common carriers, on the contrary, are allowed to "tack," unless their certificates expressly prohibit it. See, *e.g.*, *Consolidated Freightways, Inc.* v. *Lenzmeier, Inc.*, 66 M.C.C. 615, 617; *Fleetlines, Inc.* v. *Arrowhead Freight Lines, Ltd.*, 54 M.C.C. 279, 285; *Donald B. Zirbel—Investigation of Operations*, 53 M.C.C. 684, 686; *Aetna Freight Lines, Inc., Interpretation of Certificate*, 48 M.C.C. 610, 612.

in upholding the Commission's rephrasing of a permit's commodity description in the new certificate, reiterated its view that "[u]nder section 212(c) of the Act, a converted carrier is entitled to receive at the hands of the Commission a certificate that maintains parity with the operating authority contained in its contract carrier permit. The controlling factor is the operating rights authorized by the present permit." The court again recognized that it is the substance of the permit's operating authority, rather than its literal language, which is contemplated by the grandfather provision in Section 212(c).

Furthermore, the very language employed by Congress indicates an intention that the grandfather clause of Section 212(c) be administered according to the same standards as the other grandfather clauses of the Motor Carrier Act. Congress provided that the new certificate should authorize the converted carrier to transport "the same commodities between the same points or within the same territory" as authorized in the permit. In its very next session, that same Congress utilized virtually identical words to explain the effect of the grandfather clause of Section 7(c) of the Transportation Act of 1958, 72 Stat. 573–574, which is couched in the exact terminology of the original grandfather clauses of the 1935 Act. Both the Senate Report and the House Report, as well as the Conference Report, characterized Section 7(c) as enabling carriers "to continue hauling *the same commodities within the same areas or between the same points.*" (Emphasis added.) S. Rep. 1647, 85th Cong., 2d Sess. at 23;

H. Rep. 1922, 85th Cong., 2d Sess. at 17; H. Conf. Rep. 2274, 85th Cong., 2d Sess. at p. 15.

Applying the substantial parity test, it is plain that the Keystone restriction of the permit must be carried over in some form in the certificate. Otherwise, the statutory conversion of respondent's operating authority would effect a vast expansion of the permissible scope of operations and a drastic change in the competitive situation." Thus, the commodity descriptions in Montgomery's permits were broad enough to cover such major items as textiles, clothing, groceries, building materials, motor vehicles, office and kitchen furniture and equipment, petroleum products, and office supplies. Under those permits, however, respondent was restricted to transporting this broad range of products only for persons operating the designated classes of business. In the absence of any provision continuing the effect of that restriction in the certificate issued on conversion, Montgomery would be transformed from a limited carrier serving the needs of particular businesses, such as department stores, virtually to a general commodities carrier serving all comers. "The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to [the critical date]." *Noble* v. *United States*, 319 U.S. 88, 92.

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[11] On August 22, 1957, Montgomery had contracts with only 12 shippers (R. 22, 42) and operated about 8 tractors and 14 trailers (R. 22).

Although it is possible to postulate isolated examples of operations which conceivably could have been performed by Montgomery under its old permit but cannot be performed under the wording of the new certificate, such as a movement under contract with a department store wholesaler from a shoe manufacturer to a specialty shoe retailer, this would be a small price to pay for the avoidance of the mischief which the grant of unlimited authority sought by Montgomery would create.[18] Moreover, even if the restrictions of the new certificate are given full sway, Montgomery as a common carrier now has somewhat greater authority than it had prior to conversion. It is no longer limited to serving its contract shippers but may now offer its services to anyone who has shipments moving within the scope of its authority. It may now interchange with other common carriers and thus provide service beyond the geographical limits of its own certificate. It is in a position to compete with other common carriers for the business of shippers who do not have a sufficient volume of shipments to warrant entering into a continuing contract with a contract carrier. In short, the very fact of conversion has created for Montgomery greater opportunities, and there is no warrant for further expanding the scope of its operating authority. There is certainly nothing to indicate that Congress intended that the conversion of their permits to certificates

[18] The district court did not reach questions of whether the certificate was broad enough to achieve substantial parity nor whether there were fringe ambiguities in the certificate, but denied Commission authority to maintain substantial parity upon a Section 212(c) conversion.

would confer upon the converted carriers the windfall to their operating authorities which the decision of the district court would permit."[19]

II. THE STATUTORY INJUNCTION TO CARRY OVER THE COMMODITY AND TERRITORIAL LIMITATIONS OF THE PERMIT DOES NOT BAR THE IMPOSITION OF THE PRESENT RESTRICTION

Section 212(c) provides that, upon conversion, the certificate "shall authorize the transportation, as a common carrier, of the *same commodities* between the *same points* or within the *same territory* as authorized by the permit." (Emphasis added.) This, it is argued, means that the Commission is only empowered to transfer from the converted carrier's permit to a new certificate the existing language of the permit's commodity and territorial descriptions, without regard to the limitations that other provisions of the permit had in fact imposed.

At the outset, we note that such literalism is inconsistent with accepted rules of interpretation in the area of administrative regulation. This Court has repeatedly emphasized that the determination of an

[19] See S. Rep. No. 703, 85th Cong., 1st Sess.; H. Rep. No. 970, 85th Cong., 1st Sess.; Note, 107 Pa. L. Rev. 1150, 1170–1173. The statement of Chairman Clarke, relied upon by the district court (R. 71–72), is not to the contrary. As the Chairman stated, Section 212(c) gives the converted carrier "greater opportunity" in that in addition to his contract shippers, he has "the opportunity to serve the general public as well as the obligation." As a common carrier he is no longer limited to serving his contract shippers but is entitled to serve all members of the general public who have shipments moving within the scope of his operating authority. But neither this statement nor anything else in the legislative history indicates that any expansion of the scope of that operating authority was contemplated.

agency's statutory authority "does not stop with a section-by-section search for the phrase * * * among the literal words of the statutory provisions," *American Trucking Associations* v. *United States*, 344 U.S. 298, 309, and that "meaning, though not explicitly stated in words, may be embedded in a coherent scheme," *United States* v. *Ruzicka*, 329 U.S. 287, 292. "[A] section of a statute should not be read in isolation from the context of the whole Act * * *" *Richards* v. *United States*, 369 U.S. 1, 11.

In upholding the authority of the Interstate Commerce Commission to regulate the leasing of trucks by motor carriers subject to Commission regulation, despite the absence of any specific provision granting the Commission such authority, this Court, in *American Trucking Associations* v. *United States, supra*, at 309, stated:

> Here, appellants have framed their position as a broadside attack on the Commission's asserted power. All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or affect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every

> evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219–220; *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 193–194. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612.

See also *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219.

When viewed in the context of the Motor Carrier Act and in light of the purpose for which it was enacted, Section 212(c) clearly contemplates the imposition of restrictions in common carrier certificates issued to converted contract carriers wherever such restrictions are necessary to accomplish an accurate restatement of the operating rights conferred by the previously held permit.

Fairly read, the terms "same commodities" and "same territory" include the restriction here carried forward. For, although the Keystone restriction in a contract carrier permit is phrased as a restriction on the class of shippers with whom the carrier may contract, in actual effect it also limits both the commodities the carrier may transport and the territory it may serve. For example, one of Montgomery's permits authorized it to transport "such commodities as are

usually dealt in, or used by, wholesale and retail department stores." That commodity description, standing alone, would authorize the transportation of any commodities of a class customarily dealt in or used by department stores, regardless of whether the commodities at the time of shipment had any actual connection with a department store. See *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 560, and cases cited therein. In view of the wide range of goods carried by modern department stores, this is tantamount to authority to transport general commodities. But Montgomery was further limited to transporting such commodities "under contracts or agreements with persons * * * who operate wholesale or retail department stores." Because of that Keystone restriction, Montgomery was thus limited to the transportation of commodities *actually* destined for use or trade by department stores. In this manner, the Keystone restriction limited the scope of the commodity description of the permit.

By the same token, although the territorial description of Montgomery's permit authorized the movement of the above commodities between all points in a large midwestern area,[20] it was in fact limited to the transportation of those commodities to or from points used by the businesses with whom it could contract.

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[20] *E.g.*, Montgomery's department store authority included: "Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line."

Thus the Commission properly determined that, in order to limit Montgomery to the transportation of only "the same commodities between the same points or within the same territory as authorized in the permit", as provided by Section 212(c), it was necessary to incorporate in the certificate "terms which will continue, to some extent, at least, the effectiveness of [the Keystone] restrictions" (R. 44).

But even if it be argued that we read the terms too loosely and that Section 212(c) does not advert to the type of restriction here in suit, it does not follow that the Commission had no power to impose it. For, if the Keystone restriction is not classified as a commodity or territorial limitation, then, while Section 212(c) does not expressly *require* its restatement in the certificate, neither does the statute prohibit the Commission from imposing a similar limitation.

Indeed, the Congressional silence on the issue would seem to indicate "a continuation of the administrative and judicial interpretation of [the earlier statutes]." *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Congress must have been aware of this Court's construction of the earlier grandfather clauses as providing for the issuance of a certificate which maintains substantial parity with prior operations. If it had intended that this new grandfather clause be administered under different standards, a provision limiting the Commission's authority could easily have been included in the statute.

The significance of the absence of any provision so limiting the authority of the Commission is further pointed up by the fact that such provisions have been

included in other sections of the Act where Congress intended to limit the Commission's authority to restrict certificates or permits issued by it. See, *e.g.*, Section 208(a), which provides that the Commission shall not have the power to impose restrictions on the right of a carrier to add to its equipment or facilities;[21] and Section 209(b) which, prior to the 1957 amendments, provided that the Commission shall not have the power to impose restrictions on the number of contracts under which a contract carrier might operate.[22]

Furthermore, it is not unreasonable to read into Section 212(c) by implication the powers of specification granted the Commission by Section 208(a) of the Act.[23] As this Court pointed out in *United States* v.

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[21] 49 U.S.C. § 308(a): "* * * *Provided however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demand of the public shall require."

[22] 49 U.S.C. (1952 ed.) § 309(b); "* * * *Provided however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

[23] Cf. *American Trucking Associations* v. *United States*, 364 U.S. 1; *United States* v. *Texas and Pacific Motor Transport Co.*, 340 U.S. 450; *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419; and *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, where this Court approved the Commission's practice of imposing "auxiliary and supplemental" restrictions in certificates and permits issued to motor carrier subsidiaries of railroads, although that practice results from the importation into sections 207 and 209 of the Act of a standard articulated only in section 5(2)(b), pertaining to railroad acquisitions of motor carriers.

Carolina Freight Carriers Corp., supra, at 480, in upholding the imposition of restrictions to maintain substantial parity in certificates issued under the earlier grandfather clauses, Section 208(a) requires that certificates issued by the Commission "specify the service to be rendered." Section 208(a) further empowers the Commission to attach to certificates issued by it "reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require * * *". Although, as the district court pointed out (R. 69–70), Section 208(a) makes specific reference only to Sections 206 and 207 of the Act, it was emphasized by Senator Wheeler, Chairman of the Committee on Interstate and Foreign Commerce, that "Section 208(a) * * * permits the Commission to attach to *all* certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions and limitations." (Emphasis added.) 79 Cong. Rec. 5654. It would be incongruous if those who obtained their certificates under Section 212(c) were alone immune from the Commission's general power over certificates.

Finally, Section 204(a)(6) authorizes the Commission "[t]o administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration." The breadth of the power thus granted the Commission was emphasized by this Court in *American Trucking Associations* v. *United States,* 344 U.S. at 311, where that section was described as "coterminous with the scope of agency regulation itself." Here the Com-

mission has issued an order which it believes to be necessary to the proper administration and execution of the grandfather clause of Section 212(c). As such, it is well within that broad power.

III. THE RESTRICTION EMBODIED IN THE CERTIFICATE IS NOT INCONSISTENT WITH RESPONDENT'S NEW STATUS AS A COMMON CARRIER

Respondent argued below (R. 5) that the restriction imposed by the Commission in lieu of the former Keystone restriction is a limitation on the shippers it may serve, contrary to the right and duty of a common carrier to serve the general public. But there is substantial precedent for the imposition of like restrictions in the certificates of common carriers.

An analogous problem arose in cases involving the Commission's utilization of commodity descriptions involving the so-called "intended use test." The "intended use test" is a technique by which commodities are described in terms of their intended use. Thus, "building materials" means materials intended for use in construction or repair of a building. *Ace Lines, Inc.* v. *United States,* 197 F. Supp. 591 (S.D. Ia.). Similar products not intended for such use at the time of shipment are not within the carrier's authority.

Another comparable situation is illustrated by *Morehouse* v. *United States,* 194 F. Supp. 940, 945–46 (D. Neb. 1961), affirmed, 368 U.S. 348. There, a common carrier was authorized to transport "packinghouse products". The Commission held that this authorized only the transportation of products which

had, in fact, been produced or distributed by a packinghouse. Products of the same type, which had been produced or distributed by someone other than a packinghouse, were not within the commodity description. In response to a contention by the plaintiff that this constituted a restriction on the shippers he was authorized to serve, in derogation of his duties as a common carrier, the court said (194 F. Supp. at 945–46):

> Plaintiff here seeks to distinguish his situation from that before the Commission in the Chrispens case, contending that, unlike the respondent in the Chrispens case, he is a common carrier upon whom no "keystone" restriction, or limitation as to shippers or classes of shippers that he can serve, may be imposed. The Commission held, however, that while the Chrispens case involved the permit of a contract carrier, the reasoning from a commodity standpoint was applicable to plaintiff here. That plaintiff's certificate was not unrestricted, because by its very terms the transportation authorized therein was limited to certain classes of commodities, namely, "packinghouse products". Plaintiff is not limited as to the shippers he may serve, however, this does not mean that the limitations inherent in his commodity authorization can be ignored or that the commodity description "packinghouse products" in his certificate authorizes any different transportation, commoditywise, than the same authority in a permit. The fact that plaintiff is unrestricted as to the shippers he may serve affords no basis whatever for the expansion of

the scope of the commodity description in any permit issued by the Commission.

In construing analogous commodity descriptions the Commission has consistently held them not to be restrictive of the shippers or class of shippers that the carrier can serve. See and compare Andrew G. Nelson, Inc.—Investigation of Operations, 63 M.C.C. 407, 410, sustained Andrew G. Nelson, Inc. *v.* United States, D.C., 150 F. Supp. 181, affirmed, 355 U.S. 554, 78 S.Ct. 496, 2 L.Ed. 2d 484, where the Commission held that the commodity limitation in its permit does not limit the class or type of persons with whom it may contract as would a "keystone" restriction; and Sanders Extension of Operations—Washington, D.C., 74 M.C.C. 210, 213–214, where the Commission held that as long as the commodities transported are such as are dealt in by wholesale and retail grocery stores, respondent was free to transport them for any shipper or consignee regardless of the business in which he or it is engaged.

It is thus well established that a common carrier's duty to serve the general public may be confined by the restrictions inherent in its commodity description. The mere fact that only a particular class of shippers is likely to have a need for the service that the carrier is authorized to perform is not in derogation of its status as a common carrier. As a practical matter, any common carrier of specialized products is likely to confine his services, to a large extent, to a particular class of shippers, simply because they are the shippers who have the need for his services. This practical situation, however, in no way militates against his status as a common carrier.

Service restrictions similar to those employed in the instant case are not unusual in common carrier certificates. For example, a "plant site" restriction is frequently used by the Commission in a certificate in order to describe the service of a carrier who has proved the need for service only from a particular plant. Thus the certificate will authorized the transportation of particular commodities, "when moving from the site of plant X to [named destinations]". *E.g., Quickie Transport Co., Ext.—Pine Bend, Minn.*, 14 Fed. Car. Cases ¶ 35,096 (1961); *Kreider Truck Service, Inc., Ext.—Lard Oils*, 82 M.C.C. 565 (1960); *J. & M. Transportation Co., Inc., Ext.—Salt*, 82 M.C.C. 264 (1960); *Dallas & Mavis Forwarding Co., Inc., Ext.—Cleveland*, 78 M.C.C. 676, 679 (1959); *Miller Petroleum Transporters Ext.—Petroleum*, 78 M.C.C. 631, 635 (1958); *Ryder Tank Lines, Inc., Ext.—Hamilton & Hickman Counties*, 78 M.C.C. 409, 421 (1958); *Liquid Transporters, Inc., Ext.—Siloam, Ky.*, 78 M.C.C. 89, 95 (1958); *National Cartage Co., Ext.—Stickney, Ill.*, 78 M.C.C. 75, 78 (1958); *Northern Tank Line, Ext.—South Dakota*, 77 M.C.C. 35, 38 (1958); *Hayes Freight Lines, Inc., Ext.—Texas*, 77 M.C.C. 233, 238 (1958); *Boyd E. Richner, Inc., Ext.—Grants, N. Mex.*, 77 M.C.C. 766, 769 (1958); *Younger Bros., Inc., Ext.—Petrocarbon Chemicals*, 77 M.C.C. 15, 18 (1958).

The purpose of such authorizations was explained by the Commission in the *Kreider* case, *supra*, at 567.

> We cannot agree with applicant that the grant of plant-site authority is too restrictive. Although plant-site restrictions are not normally imposed in grants of authority to com-

> mon carriers, there are circumstances, such as are here present, which require the imposition of such a restriction. The application is supported by only one shipper whose traffic to Memphis presently amounts to only about 3.5 truckloads a month. The shipper is located at a point lying within the commercial zone of St. Louis, and the resulting scope of the authority, if the restriction were removed, would afford applicant the opportunity to serve a vast public far exceeding the limited proof of a need for service shown by the single supporting shipper. * * *

The same reasoning is equally applicable here. If the restrictions inherent in respondent's permit were completely removed, it would be given the opportunity to perform far greater services than it had ever been authorized to perform as a contract carrier. This would result in a totally new competitive situation never contemplated by the conversion provisions of the statute.

In other proceedings, the Commission has limited common carriers to plant-site destinations (as distinguished from the plant-site origins involved in the above-cited cases), *William O. Mattox, Ext.—Old Bridge, N.J.*, 77 M.C.C. 165, 168 (1958); to shipments originating at specified points outside the United States, *Chemical Tank Lines, Inc., Ext.—Willow Island, W. Va.*, 77 M.C.C. 39, 42 (1958) ("restricted to shipments originating in Canada"); *Thomas W. Murray—Territorial Operations*, 11 Fed. Car. Cases ¶33,638 (1956) ("restricted to traffic moving to or from the territory of Alaska"); and to traffic "mov-

ing on Government bills of lading", *Arco Auto Carriers, Inc., Ext.—North Tarrytown, N.Y.*, 13 Fed. Car. Cases ¶34,262 (1958); *C & D Transp. Co., Inc., Ext.—New Orleans to Orange*, 78 M.C.C. 293, 295 (1958). Such restrictions as these have never been considered in any way inconsistent with a carrier's status as a common carrier.

In at least one case, the Commission has employed almost the identical language used in the instant case. In *L. Nelson & Sons Transp. Co. Ext.—Synthetics*, 62 M.C.C. 271, 283 (1953), the applicant was granted a common carrier certificate to transport "materials used in the manufacture of cloth, waste materials, resulting from the manufacture of cloth, and supplies and materials used in connection with the transportation or processing of these commodities *when moving to or from places of processing.*" (Emphasis added.)

We submit that there is nothing unusual in the type of service restriction incorporated in the certificate in suit. The limitation is fully consistent with respondent's new status as a common carrier:

In the final analysis, the Commission's imposition of restrictions preserving a substantial parity between Montgomery's prior and future operating authority reflects a judgment fully responsive to the intent of Congress in enacting Section 212(c) and to the Congressional mandate expressed in the National Transportation Policy, namely, that the Act be administered to the end of developing and preserving an adequate, efficient, and economic national transportation system.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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AUGUST 1963

APPENDIX

STATUTE INVOLVED

Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)), as amended August 22, 1957; 71 Stat. 411, provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 204(a)(6) of the Interstate Commerce Act (49 U.S.C. 304(a)(6)), provides:

> It shall be the duty of the Commission—
>
> * * * * *
>
> To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration; * * *

Section 208(a) of the Interstate Commerce Act (49 U.S.C. 308(a)) provides:

> Any certificate issued under section 306 or 307 of this title shall specify the service to be

rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 304(a)(1) and (6) of this title; *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Section 212(c) of the Interstate Commerce Act (49 U.S.C. 312(c), as amended August 22, 1957, 71 Stat. 411), provides:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if its finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the

definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

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No. 66

IN THE

Supreme Court of the United States

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Appellants,

v.

J. B. MONTGOMERY, INC.,

Appellee.

On Appeal from the United States District Court for the District of Colorado

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BRIEF FOR THE APPELLEE J. B. MONTGOMERY, INC.

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September 30, 1963

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Sections 5(b), 203(a)(14), 203(a)(15), 204(a)(1), 204(a)(6), 208(a), 209(b), and 212(c) of the Interstate Commerce Act, 49 U.S.C. §§ 5(b), 303(a)(14), 303(a)(15), 304(a)(1), 304(a)(6), 308(a), 309(b) and 312(c), and Section 7(c) of the Transportation Act of 1958, Stat. 573-574 are set forth in the Appendix, *infra*, pp. 39-42.

STATEMENT

The appellee submits that the following additional facts should be before the Court:

A consolidated hearing, Examiner's report and recommended order was served September 26, 1958, which included the proceeding in Docket No. MC-72273, *J. B. Montgomery, Inc., Modification of Permit.* (R. 13-35) The Examiner found that J. B. Montgomery, Inc.'s operations did not conform with the definition of a contract carrier and therefore it was recommended that a Certificate of Public Convenience and Necessity authorizing common carriage issue in lieu of the appellee's Permit. (R. 28) The authority recommended did not contain the restriction subsequently imposed by Division 1 of the Commission as the Hearing Examiner concluded that such a restriction would be incompatible with the appellee's duty as a common carrier. (R. 26, 31-32).

After the issuance of the report and order of the Commission, Division 1 (R. 36-52), the appellee filed a Petition for Reconsideration and by Order dated May 17, 1961, the Commission denied the petition. (R. 53-53). The appellee exhausted its administrative remedies.

The District Court in setting aside the Commission's Order and remanding the matter for further action by the Commission, specifically held that the Commission was without statutory authority to impose the restrictions in question. (R. 73).

SUMMARY OF ARGUMENT.

The appellee has not received a certificate authorizing it as a common carrier to carry the same commodities to the same points or within the same territory as authorized in its permit, because of the Commission's imposition of restrictions which limit service from, to, or between wholesale or retail outlets of a specified type. The failure of the appellee to receive such a certificate constitutes a violation of Section 212(c) of the Interstate Commerce Act.

Imposition of the restrictions would result in a substantial diminution of the appelle's commodity and territorial authority. The inability of the appellee to carry the same commodities between the same points or within the same territory precludes the appellee from providing the same service it could provide as a contract carrier. This diminution is substantial and real.

The restrictions could also have a prospective effect which the Commission ignored. A change in the marketing pattern of the commodities involved could substantially increase the severity of the Commission's action and cause additional harm to the appellee in derogation of the protection which Congress afforded it.

The Commission is without the statutory authority to impose the restrictions. Section 212(c) is clear and unambiguous on its face. The section is specific in assuring that the appellee, as a converted common carrier, would have the authority to carry the same commodities between the same points or within the same territory as authorized in its permit. No other meaning can be ascribed to it. The Commission is violating its administrative function by attempting to inject additional standards which would allow

it to restrict the appellee's authority in the manner attempted.

The appellants' injection of the legislative history and other sections of the Act in support of its position is not apropos since no ambiguity exists in the statutory language of Section 212(c). Furthermore, recourse to the legislative history or other sections of the Act does not sustain the imposition of the restrictions. On the contrary, it emphasizes that the Commission has transgressed its authority.

Section 212(c) was not intended to restrict the converted carrier's authority. On the contrary, a certain enlargement in the scope of operations of converted carriers was anticipated (R. 72). Assurance that a converted carrier's authority would not be diminished was also sought by the legislators. The Commission, through its spokesman, Chairman Clarke, gave such assurance. Mr. Clarke stated explicitly that nothing would be taken from the carriers. (R. 71). The Commission's action in this cause, however, is contrary to the position it took in advancing the legislation involved. Its action is therefore contrary to the predicate of the legislation as well as the specific statutory language enveloping the intent of Congress.

The juxtaposition and cross-referencing of the various sections of the Act in an attempt to seize upon some fragment of authority ignores the maxim *expressum facit cessare tacitum* (that which is expressed makes that which is implied to cease). Recourse to other sections of the Act cannot change the clear and ordinary meaning of Congress' commands. Section 212(c) is explicit in what can be done. Furthermore, the sections cited differ from section 212(c) in that they affirmatively give the Commission statutory authority to impose restrictions. In the

absence of such affirmative delegation in Section 212(c), the Commission has no authority to impose the restrictions and precedent precludes the Commission from engrafting its own standards.

Finally, it must be recognized that the imposition of the restrictions is inconsistent with the obligations imposed upon the appellee. Such restrictions are imposed in contract carrier permits to limit the essential character of the service to be rendered so as to prevent the contract carrier from serving the general public. The appellee, as a common carrier, however, is obligated to serve the general public. The Commission's imposition of the restriction is a departure from its own precedents and will result in the abrogation of the appellee's recognized rights, duties and obligations as a common carrier.

QUESTIONS PRESENTED

The following questions are presented by this action:

1. Does the Commission have the statutory power under Section 212(c) or any other applicable provisions of the Interstate Commerce Act to impose restrictions on the authorities of the converted carrier limiting the service authorized to movements from, to or between outlets or other facilities of particular classes of shippers?

2. Are such restrictions territorial limitations which do not permit the converted carrier to transport the same commodities between the same points or within the same territory as authorized in its Permit, contrary to the provisions of said Section 212(c) of the Act?

3. Are such restrictions contrary to the converted carrier's rights, duties, and obligations as a common carrier to perform service for the general public within the limits of its facilities on the commodities and between the points or within the territories authorized to be served by it?

ARGUMENT.

1. The Restrictions Imposed Are Contrary to the Specific Dictate of Congress.

Congress was specific in dictating the power it was granting the Commission under Section 212(c) of the Act, 49 U.S.C. 312(c). It is succinctly stated:

> "The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. *Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.*" (Emphasis added.)

The language is clear and unambiguous on its face.

The appellants concede that the appellee is entitled to certification as a common carrier, (A. 12),* that the certificate must embody the same territorial and commodity authority as the prior permit (A. 12), and that the imposition of the restrictions would preclude the appellee from carrying the same commodities between the same points or within the same territory so authorized in the

*"A" references are to appellants' brief.

permit. (A. 24). In what appears to be a direct attempt to circumscribe the applicable legislation, appellants would impose the restrictions on the basis that the failure of the appellee to receive the full authority guaranteed it by Congress ". . . would be a small price to pay for the avoidance of the mischief which the grant of unlimited authority sought by Montgomery would create." (A. 24).

The above position of the appellants was rebuffed by the District Court which recognized that the Commission was attempting to inject its own standards. The District Court stated (R. 72):

> "Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish "substantial parity" between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history."

This finding is constant with existing law as recognized in numerous cases before this honorable Court.

It is axiomatic that the Commission or any administrative body has the power to act only on the basis of specific statutory authority granted to it by Congress. In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), Mr. Justice Reed speaking for the Court, at p. 369, clearly set this forth:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that 'back pay' awards under the Labor Act

> should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function".

Similar cases wherein the same judicial opinion is espoused are legion. See, for example, *Colgate Palmolive-Peet Co.* v. *NLRB*, 338 U.S. 355 (1949) and *United States ex rel. Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 18 F. Supp. 94 (D.D.C. 1937).

In the instant cause, the Commission predicates its action on the basis that Section 212(c) is subject to construction and that its views as an administrative body are entitled to great weight (A 13). It is a well recognized principle that in the interpretation of a doubtful or ambiguous statute the long-continued and uniform practice of the authorities charged with its administration is entitled to great weight, and will not be disturbed except for cogent reasons. This principle, however, has no effect where there is no ambiguity in the statute. See, for example, *Louisville & Nashville Railroad Company et al.* v. *United States et al.*, 282 U.S. 740 (1931); *Norwegian Nitrogen Products Company* v. *United States*, 288 U.S. 294 (1933); and *United States et al.* v. *Missouri Pacific Railroad Company*, 278 U.S. 269 (1929).

Section 212(c) is clear and unambiguous on its face. The converted carrier is entitled to a certificate authorizing the transportation ". . . of the same commodities between the same points or within the same territory as authorized in the permit."

Recourse to the legislative history of Section 212(c) or other sections of the Act, and/or general transportation policies is not warranted. The dictate of Congress is precise and clear. The appellants' admission that these dictates have not been followed because of other considerations should foreclose their prayer for the relief requested from this Court. To allow the Commission to consider these other factors in the absence of an ambiguity would be tantamount to allowing it to deprive appellee of a substantial right guaranteed by affirmative enactment of Congress through the imposition of administrative legislation.

The Commission, while recognized as an able administrative agency, cannot resist legislative change and seek to conform all new legislation with past practices. The Commission's attempt to predicate its authority on the basis of other sections of the Act is an attempt to do so.

The appellants seek to depart from the clear language of Section 212(c) of the Act on the basis that the section was referred to by the Commission and several parties as a "grandfather" clause and that it has all of the attributes of the "grandfather clauses" of the Motor Carrier Act of 1935, Sections 206(a)(1) and 209(a)(1) of the Act, 49 U.S.C. 306(a)(1) and 309(b)(1), including the concept of "substantial parity" (A. 18-19). This argument was answered effectively in the decision of the District Court. Therein, it was pointed out that the power to impose territorial restrictions under the "grandfather" provisions is "derived from express delegation of power by Congress" and that "Section 212(c) neither authorizes the Commission to specify territory nor determine bona fides of prior operations", (R. 69-70).

Perusal of the applicable sections of Part II of the Act which deal with the grant of operating authority, i.e., Sections 206, 207, 208, and 209, 49 U.S.C. 306, 307, 308, and 309, and Section 7(c) of the Transportation Act of 1958, amending Section 203(b)(6), reveal that each of these sections contain either specific provisions giving the Commission the power to impose restrictions or conditions on the authorities granted, or refer to other sections of the Act granting that power. In fact, the provisions of Section 209(b) of the Act, 49 U.S.C. 309(b), as they were written prior to the 1957 amendment, were construed as giving the Commission the specific statutory power to impose "Keystone" restrictions in the authorities of contract motor carriers. The pertinent portion of said Section 209(b) of the Act, as it was then written, reads as follows:

> "... The Commission shall specify in the permit the *business of the contract carrier* covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, *such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier* as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304(a)(2) and (6) of this title". (Emphasis added)

The Commission in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, construed the above language as giving it the right to impose "Keystone" restrictions with respect to the contract carrier authorities of both "grandfather" clause applicants and applicants for new authority. The Commission stated:

> "Here again there is no confusion of thought, but merely a *clear statement* of our *powers and duties* in connection with the granting of permits by either of the two methods above mentioned ('grandfather'

> operations and new operations) . . . it is clear that we have power to incorporate in a permit the territory or points to be served, the commodities to be transported, the equipment to be used, and any other specification necessary to describe the service authorized, *even to the extent of limiting the service to be rendered to that of a particular type—such as that rendered a retail food store*". (Emphasis added.)

In *Noble* v. *United States*, 319 U.S. 88 (1943) the Supreme Court affirmed the power of the Commission to impose a restriction limiting a contract carrier authority to service under contract with a particular class of shippers, and specifically found that the language of Section 209(b) of the Act was applicable to a "grandfather" clause applicant as well as to a new operator. The Court stated, at 92, footnote 4, as follows:

> "We do not accede to the suggestion that the permit specification clause in §209(b) is applicable only to new operators, not to 'grandfather' applicants. The Commission has consistently taken the view that it covers both. Re *Motor Convoy, Inc.*, 2 M.C.C. 197, 200; Re *Wray Wible*, 7 M.C.C. 165, 168; Re *Hunter*, 13 M.C.C. 109, 112, 113; Re *Marine Trucking Co.*, 17 M.C.C. 615. That interpretation is entitled to 'great weight'. *United States* v. *American Trucking Assos.*, 319 U.S. 534, 549, 84 L. ed. 1345, 1354, 60 S. Ct. 1059. It is consistent with the wording of §209. Paragraph (a) requires a contract carrier to have a 'permit' in order to issue the permit 'without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b)' within the prescribed time limitation."

It is clear from the above that the Commission relied upon specific statutory authority in imposing "Keystone" restrictions on contract carriers. This same type of specific statutory authority was carried forward, and strengthened,

in the 1957 amendment to Section 209(b) of the Act. As now in effect, Section 209(b) reads as follows:

> ". . . The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6). . ."

Sections 206, 207 and 208 of the Act, 49 U.S.C. 306, 307, and 308, contain comparable provisions to Section 209 dealing with the grants of authority to common carriers and the issuance of Certificates of Public Convenience and Necessity. Section 208 deals specifically with the terms and conditions which can be imposed in said Certificates, and reads as follows:

> "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions

as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6)."

It is to be noted that the Commission, as in the case of contract carrier permits, is given the specific statutory authority to impose restrictions and conditions in the grants of Certificates to common carriers. This statutory authority is well recognized by the Commission and its powers thereunder have been approved by the Court. *U.S. v. Rock Island Motor Transit Company*, 340 U.S. 419 (1951). However, such statutory powers are limited to certificates "issued under sections 206 and 207". Section 206 contains the "grandfather" clause provisions of the Motor Carrier Act of 1935 and the 1950 amendment; and Section 207 relates to applications for new authority. There is nothing in Section 208 which would infer that it applied to any other sections of the Act, such as Section 212(c); and as indicated Section 212(c) does not make reference to Section 208 or to Certificates to be issued under Section 206 or 207.

In contrast to the lack of any statutory inference that Congress intended to give the Commission the power to impose restrictions or limitations on Certificates granted under Section 212(c), the Court's attention is directed to the "grandfather" clauses added to the Interstate Commerce Act since the original Motor Carrier Act of 1935. These are: Sections 206(a)(3) and 209(a)(3) of the Act; 49 U.S.C. 306(a)(3) and 309(a)(3) added in 1950, and Section 7(c) of the Transportation Act of 1958 amending Section 203(b)(6) of the Act.

Section 208 and 209(b), respectively, apply to the first two subsections described above, and give the Commission the same statutory power to impose restrictions and

limitations in the authorities granted as were applicable to the original "grandfather" clause applications under the Motor Carrier Act of 1935. The "grandfather" clause of the Transportation Act of 1958 contains provisions similar in effect to the "grandfather" clauses of the Motor Carrier Act of 1935 and relate such applications to Section 206(b) and 209(b), respectively. Paragraph (b) of said Section 7 of the Transportation Act of 1958 reads in part as follows:

> ". . . the Interstate Commerce Commission shall without further proceeding issue a Certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if *application is made to said Commission as provided in Part II of the Interstate Commerce Act* and within one hundred and twenty days after the date on which this section takes effect." (Emphasis added)

There is nothing in the language of Section 212(c) of the Act which would indicate that an application was to be filed "as provided in Part II of the Interstate Commerce Act" (which we fairly infer as applying to Section 206(b)), nor that either Sections 206 or 208 were applicable to certificates authorized to be granted under Section 212(c). In fact, following the enactment of Section 212(c), the Commission amended its regulations dealing with application forms 49 CFR 168, to provide for a separate form for applications filed under the provisions of Section 212(c). 49 CFR 168.2, amended September 10, 1957, 22 F.R. 7529. Thus, in all respects Section 212(c) is considered as a separate and distinct type of authority which cannot be related to any other pertinent sections of the Interstate Commerce Act.

The Court's attention is also directed to the fact that in Section 5(b) of the Act, 49 U.S.C. 5(b), dealing with the

combination and consolidation of carriers, including motor carriers, the Commission is given the statutory authority to approve proposed finance transactions found to be consistent with the public interest "subject to such terms and conditions and such modifications as it shall find to be just and reasonable".

Section 212(c) also differs significantly from the "grandfather" clauses of the Act in theory. The Commission recognized this in *T.T. Brooks Trucking Co., Inc., Conversion Application*, 81 M.C.C. 561 (1959). At pages 570-571 of the report in that case, it is stated:

> "While we are satisfied that what section 212(c) provides is essentially 'grandfather' legislation with reference to operating authorities (and what may for convenience be termed a 'grandfather' clause), such 'grandfather' clause, as indicated above, differs from the 'grandfather' clauses contained in the Motor Carrier Act, 1935, in that the latter required proof by competent evidence of past and continuous bona fide 'operations' as the basis for the issuance of certificates and permits authorizing their continuance in the 'grandfather' clauses that the 'substantial parity' test referred to by many of the parties first arose. Thus, in reviewing our determination of an early application proceeding arising under the 'grandfather' provisions of section 206 of the Act, the Supreme Court stated that the purpose of that 'grandfather' clause was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior bona fide operations'. *Alton R. Co.* v. *United States*, 315 U.S. 15, 22. A short time later that Court indicated that we also had the power to impose in 'grandfather' certificates appropriate restrictions to insure that substantial parity between past and future operations is maintained. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475. It may be noted too that in past determinations of such

'grandfather' rights, the precise pattern for future operations has been characterized as the product of this Commission's own expert judgment based on evidence as to prior operations, characteristics of the type of carrier involved, and the capacity or ability of the carrier to render service, *Howard Hall Co., Inc.* v. *United States*, 315 U.S. 495; and that restrictions compatible with a carrier's operations have been imposed under certain circumstances, *Crescent Exp. Lines, Inc.*, v. *United States*, 320 U.S. 401.

"In view of the utilization of the substantial parity test in the past, and in the absence of any congressional expression to the contrary, we are constrained to hold here that the so-called 'grandfather' clause contained in Section 212(c) should be administered on the basis of a 'substantial parity' test with respect to the conversion of *operation authorities* involved therein."

The contradictory elements in this discussion are apparent, and virtually defy comprehension. First, the Commission says that Section 212(c) is a "grandfather" clause, but is not a "grandfather" clause in the same sense as that originally employed in the Motor Carrier Act of 1935. Second, the Commission says, in effect, that the two can nevertheless be equated by ignoring their language and using as a common denominator, the "substantial parity" test developed in connection with the original "grandfather" clause. As a further contradiction, the Commission states, at a later point in the decision, that Section 212(c) "differs from other 'grandfather' provisions of the statute in that it contains no requirement that the converted carrier prove past bona fide operations, and that it has for its basis not the actual operations performed by the carrier but those authorized by its permits." We are reminded of Mr. Justice Jackson's comment in his dissenting opinion in the second decision in *Securities and*

Exchange Commission v. *Chenery Corporation*, 322 U.S. 194 (1947):

> "I give up. Now I realize fully what Mark Twain meant when he said: "The more you explain it, the more I don't understand it'."

"Grandfather" rights under the Motor Carrier Act of 1935 and the Transportation Act of 1958, are predicated on proof of bona fide operations, i.e., actual operations of a substantial nature. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480 (1942). Section 212(c) however, does not refer to "bona fide operations", 'substantial parity' or any similar abstract conceptions. The statute clearly states the conditions under which a certificate will issue. The appellee's operations under its permit are not significant. It is the authority which is significant. Congress specifically stated that the authority held in a converted carrier should be changed in a specific manner and in no way indicated that the Commission should go beyond its dictates to determine the practical effects which the change of the authority would have if compared with the appellee's past operations. If it had desired the Commission to do so, it could have used statutory language similar to that in the "grandfather" clauses and specifically delegated such authority to the Commission.

The appellants argue that specific authority is not needed because "Congressional silence on the issue seems to indicate a continuation of the administrative and judicial interpretation of [the earlier statutes]." (A. 29). Appellee submits, however, that Congress was not silent on the subject. Congress stated specifically that the appellee be authorized to carry the same commodities between the same points or within the same territory as authorized in the

permit. Any administrative action which would interfere with the appellee's enjoyment of this right is precluded. Contrary to the assertion of the appellants, the Congress did not have to include a provision specifically limiting the Commission's authority. The District Court recognized this when it stated (R. 71):

> This [last sentence of Section 212(c)] is tantamount to saying that the Commission shall not impose territorial restrictions beyond those contained in the permit.

To take a contrary position entirely overlooks the fact that administrative powers may be limited by affirmative dictates as well as by negative ones. Congress can state that a thing be done in a particular mode and this includes a negation of every other mode. See, for example, *Botany Worsted Mills* v. *United States*, 278 U.S. 282 (1929).

"Substantial parity" is therefore not constant with the dictates of Section 212(c). The language of that section affirmatively sets forth the standards governing conversions from contract to common carriage, and the Commission had no authority to deviate from such standards even though it may have disagreed with the wisdom of the legislators. If Congress had felt that the expertiseness of the Commission was needed in applying the statute to fit individual situations, Congress would have specifically provided the Commission with the necessary authority to achieve that goal. Congress has specifically done so in other sections of the Act; its abstention in Section 212(c), and its use of affirmative dictates to proceed in a specific way in that section, can only lead to the reasonable conclusion that the Commission has exceeded its statutory authority by reading into the Section a power which does not exist.

2. The Legislative History of Section 212(c) Precludes the Imposition of the Restrictions.

Appellee maintains, as previously indicated, that the clear and unambiguous language of Section 212(c) of the Act precludes any consideration of legislative history or other factors purportedly bearing on the construction of Section 212(c). Appellants, on the other hand, claim that such recourse is proper as Congress may have intended to give the Commission certain powers not specifically expressed in Section 212(c).

To the extent that resort to the legislative history is appropriate, appellee submits that the history supports the position that Congress did not intend to give the Commission the power to impose territorial or commodity restrictions beyond those contained in the permit of the converted carrier. In fact, the legislative history makes it abundantly clear that Congress did not intend to take *anything* away from the converted carrier. The District Court recognized this and further concluded that nothing in the legislative history cited by the Commission indicated a contrary intent (R. 71).

The specific proposal of the Commission as set forth on pages 162-163 of its 70th Annual Report, November 1, 1956, reads as follows:

> "6. (a) We recommend (1) that the definition of contract carrier by motor vehicle as set forth in Section 203(a)(15) be amended so as to state clearly the nature of the services which may be performed by such carriers and to provide that such services may be performed under continuing contracts for only one person or a limited number of persons, and (2), if so amended, that section 212 be amended by adding a new paragraph (c) authorizing the Commission to revoke the permit of such a carrier and to issue in lieu thereof

> a certificate of public convenience and necessity if it finds, after a hearing, that the operations of the permit holder are not those of a contract carrier under the revised definition, are those of a common carrier, and are otherwise lawful."

The proposal was silent in respect to the need for the imposition of the restrictions here involved, or the intent on the part of the Commission to have Congress give it the power to impose them.

When Mr. Clarke, then Chairman of the Commission, was being questioned about the proposal in the subsequent Senate Subcommittee hearings, again no mention of such restrictions was made. See *Surface Transportation—Scope of Authority of Interstate Commerce Commission, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate*, 85th Cong., 1st Sess., hereinafter referred to as *Hearings*.

Rather than state or even infer that such restrictions might or would be imposed of necessity, the Commission through its spokesman, Chairman Clarke, specifically stated that Section 212(c) was not intended to reduce the scope of the authority granted a converted carrier, but, rather, to give the carrier greater opportunity.

In a colloquy occurring between Mr. Barton, transportation counsel of the Senate Interstate and Foreign Commerce Committee, and Chairman Clarke, the following pertinent question and response, as set forth in the District Court's opinion (R. 71), appears:

> "Mr. Barton: Mr. Clarke, do you think there is any constitutional difficulty in changing, as we say, as you propose, a contract carrier to a common-carrier status?
>
> Mr. Clarke: No, I can see none. *It isn't taking away from them anything that they have;* it isn't disturbing any property rights of the contract carrier.

> *It is giving him greater opportunity.* He can still serve his contract shippers, but through the conversion provisions of the bill, *he would also have the opportunity to serve the general public as well as the obligation.*" (Emphasis added). (P. 35 Hearings—Surface Transportation—Scope of Authority of Interstate Commerce Commission, 85th Cong. 1st Session.)

The Commission recognized that as a common carrier there would be an implicit appreciation in the carrier's ability to provide service, without limiting in any way the operations which they could previously perform as a contract carrier. The Commission did not state at that time or any other time during the Hearings that the converted carrier would be in substantial parity with its contract carrier status. The carrier would have "greater opportunity" and "could serve the general public as well as the obligation". The converted carrier could provide the same service to the existing clients as well as to the general public. The appellee would be precluded from doing so by the imposition of the restrictions.

The attention of the Senate was subsequently focused on "Keystone" restrictions as indicated by the following excerpt from the *Hearings*, at page 182:

> "Mr. Oren: They can haul for everyone. They can haul between the territories that they serve. They surely are not limited in any way as to what they can do and what they cannot do.
>
> Senator Purtell: You are speaking of the common carriers?
>
> Mr. Oren: I am speaking of the common carriers. Now, the contract carrier, on the other hand, must have a contract. It is limited as to its commodities. It is limited as to its territories. It is limited as to shippers. It is limited in many, many ways and the common carrier has no limitation whatsoever. They may haul general commodities; they may haul to or

from. They can haul everything practically that a contract carrier can haul, and I can't see how they can figure that—

Senator Purtell: Well, is it limited as to the number of shippers?

Mr. Oren: The common carrier is not.

Senator Purtell: I am talking about the contract carrier.

Mr. Oren: It never has been according to law, according to the way they granted us authority originally. There is no limitation in that respect.

Senator Purtell: I thought you stated you had that limitation.

Mr. Oren: Limitation as to shippers, but not the number.

Senator Purtell: *Character,* but not number."

(Emphasis added.)

Since Congress was aware of such restrictions, it would have been a simple matter to authorize their imposition. Congress has affirmatively done so in other sections of the Act. Instead, Congress adopted clear and unambiguous language which directed the Commission to act in a set manner. The Commission is under an obligation to act in that manner. It did not do so. The imposition of the restrictions, as conceded by the appellants (A. 24), would preclude the appellee from performing the same operations as it could under its old permit. This is contrary to the dictates and intent of Congress.

3. The Considered Restrictions Serve as Territorial Limitations Which Do Not Permit the Transportation of the Same Commodities Between the Same Points or Within the Same Territory as Contained in the Permit.

The Commission's contentions in *T. T. Brooks Trucking Co., Inc., Conversion Application,* 81 M.C.C. 561, and in the administrative report herein, that nothing commodity-

wise or territorially would be taken away from the converted carriers is not constant with the facts.

As a contract carrier, the appellee could transport any commodities dealt in by one of the class of shippers included under its "Keystone" restriction from, to or between any points in its authorized territory irrespective of the particular type of facility or business outlet from or to which the shipment was moving. Thus, if a wholesale department store, for example, desired appellee to transport a shipment directly from one of its suppliers to a customer, appellee was authorized to transport such a shipment under its contract with the wholesale department store. In the same manner, if a retail store desired appellee to perform a distribution service from a public warehouse to a number of customers, appellee was in a position to offer such a service. As a common carrier, however, it could not offer either of these services, since its authority is restricted to shipments moving physically from, to or between wholesale or retail department stores. The other restrictions have a similar effect. They limit the territory which can be served to particular types of business facilities or outlets. Thus, while purporting to grant authority to transport the same commodities and the same territory, the restrictions take away the right to serve all of the points in the territory, and accordingly limit the authority not only territorially but commoditywise.

Other specific examples illustrating the manner in which the converted authority of the appellee was diminished territorially and commoditywise by the restrictions emphasize the seriousness of the appellee's plight and the extensiveness of the loss it will suffer.

Appellee as a contract carrier was authorized to transport "Such commodities as are usually dealt in, or used

by, wholesale and retail department stores'' between Chicago and Denver, on the one hand, and on the other, a described portion of Illinois and Colorado, and all points in Kansas, Iowa and Nebraska. Its ''Keystone'' restriction permitted contracts with persons ''who operate wholesale and retail department stores, the business of which is the sale of general merchandise''. Under this authority, it could perform the following illustrative movements:

1. From a supplier to a consumer.
2. From a public warehouse to a customer.
3. From a supplier to a public warehouse.
4. From one public warehouse to another public warehouse.
5. From a supplier or public warehouse to a consolidation or transfer point.
6. From a supplier to a labeler or other person who performs work on a product on behalf of a department store.

None of the above movements could be handled by appellee as a common carrier, despite the fact that the shipments were being transported upon behalf of a department store. The converted authority is specifically restricted ''to shipments moving from, to or between wholesale or retail department stores''; and none of the business outlets described in the examples would so qualify. Thus, in effect, the authority of appellee is sharply cut from a broad territorial grant of authority to service from and to particular department stores within that territory. In the same manner, if the origins and destinations do not qualify as shipping points because of the above restrictions, appellee is deprived of the right to transport

the commodities which it is authorized to transport moving between those points. This further serves as a commodity limitation.

Appellee as a contract carrier was also authorized to transport "Such commodities as are usually dealt in, or used by, meat, fruit and vegetable packinghouses", between the same territory covered by the department store authority, under contract with persons "who operate wholesale or retail establishments, the business of which is the sale of meat, fruit and vegetable packinghouse products". Under this authority, appellee served under contract with meat packinghouses, canners and distributors of frozen foods. Set forth below are illustrative examples of the type of transportation which appellee was authorized to perform as a contract carrier:

1. Canned goods from a public warehouse to another public warehouse, an institution such as a hospital, school, county farm, etc., or to governmental installations, such as an Army camp or the Air Force Academy.
2. Frozen foods from a public cold storage warehouse to another cold storage warehouse or to the other types of receivers described in 1 above.
3. Vegetable oil or butter (both commodities dealt in by meat packinghouses) from a supplier (who is not a meat packer) directly to a customer of a meat packer, such as a bakery or other food processor.
4. Supplies, such as sugar, salt or glass bottles, used by a vegetable packinghouse, which are stored at outside warehouses, and the movement is from the supplier to such location.
5. Similar type supplies to those described in 4 above which cannot be fully used and are resold, and move either from the supplier to a consignee not

engaged in the sale of meat, fruit and vegetable packinghouse products, or from a warehouse to such type of consignee.

6. Any import shipments of meats which move from a ship dock to a warehouse, institution or transfer point, or are stored in a warehouse near the dock and are later shipped to locations described above.

7. Import shipments of hides, for example, from a ship dock to a tannery.

8. Export shipments, such as of frozen meats, sausage casings, etc., from a warehouse to a ship dock.

Under appellee's converted authority, restricted as it is to "shipments moving from, to or between wholesale and retail outlets, the business of which is the sale of meats, fruits and vegetable packinghouse products", it would not be authorized to perform any of the above indicated transportation. The consequences of such restrictions are substantial as in the case of the department store authority, since it in effect changes the authority from a broad territorial grant to service from, to and between particular outlets selling meat, fruit and vegetable packinghouse products. The Court is well aware that the interstate transportation of meats and packinghouse products can be performed only from federally inspected meat packinghouses. Therefore, since public warehouses, ship docks, etc. are not included within the language of the restriction, appellee's authority to transport meats and packinghouse products is virtually limited to transportation from, to or between these federally inspected packinghouses. As indicated above, it would not be in a position to transport these same commodities between public warehouses or cold storage houses used by such companies, nor would it be in a position to participate in any movements of imported or

exported packinghouse products moving between a ship and a facility that was not within the category of "wholesale and retail outlets, the business of which is the sale of meat". The same type of restrictions would apply in the case of the transportation of fruit and vegetable packinghouse products such as canned goods, various frozen foods and other similar commodities dealt in by fruit and vegetable packinghouses. It is impossible to measure the future impact of this type of restrictions, since Montgomery could be prevented in the future from transporting any commodity which it is authorized to transport, simply because it does not move from, to or between the particular type of business outlets described in the restriction.

The third authority held by appellee which was subject to a "Keystone" restriction permitted it to transport "such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, equipment, materials and supplies used in the conduct of such businesses" from Chicago, Ill. to certain named Colorado and Nebraska points, under contract with persons "who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories". Under this authority, it could perform all the movements illustrated above with respect to the department store authority; and in addition, it could perform the following movements:

1. From a public warehouse (used by a hardware wholesaler for example) to a retail store not qualifying as a retail "hardware establishment", such as a discount house or garden supply store
2. From a supplier (of a hardware wholesaler) to the same type of retail stores

3. From a supplier (of a wholesale distributor of automobile-accessories) to a retail outlet not qualifying as an "automobile accessory establishment"

4. From a public warehouse (used by a wholesale distributor of automobile accessories) to the same type of retail outlets

5. From a supplier or public warehouse (used by a wholesale distributor of automobile accessories) to a major oil company for distribution to gas stations.

None of the above movements would be performed by appellee as a common carrier. The authority is now restricted "to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments". The practical effect of the restriction could be to prevent service under the converted authority to some of the smaller towns included as destinations in the particular grant of authority. If the town lacks a store which was characterized specifically as a hardware or automobile accessory establishment, appellee would be prevented from serving the town on any movements from a supplier, public warehouse or other type of business establishment not falling specifically within the restriction. To all of the cities and towns named in the authority, the converted authority restricts the service specifically to or from hardware or automobile accessory establishments.

The restrictions also preclude the appellee from carrying the same commodities it could under its permit. For example, if the restrictions are imposed, the appellee would be unable to make pick-ups at a supplier of a department store and deliver it to a customer's office or house. It is common knowledge, however, that many items such as

furniture, major appliances, and farm supplies which are dealt in by department stores move direct to the purchaser from the supplier.

The certificate the Commission would issue the appellee ostensibly permits the transportation of all commodities dealt in by meat, fruit and vegetable packinghouses. Under its permit, the carrier could carry non-exempt vegetables for a wholesaler selling to an institutional user. The imposition of the restrictions in the certificate to be issued the appellee could preclude it from carrying non-exempt vegetables if they were shipped direct from the farmer to the institutional user. Yet, this is a common marketing pattern.

It can therefore be seen that in multiple respects the action of the Commission violates the prescription against a diminution of "commodity" rights as well as "territorial" rights.

The appellants speak of these limitations as being "isolated" examples (A. 24). This is not true and the appellants have no basis for making that characterization. The restrictions result in a substantial diminution of the appellee's rights. The above cited examples are limited to the more obvious situations; the examples are not exhaustive.

It should also be recognized that the Commission's unlawful imposition of the restrictions could have a serious effect on the appellee's future operations; this is a consideration entirely ignored under the "substantial parity" philosophy. A permit or certificate authorizes a carrier to provide service until revoked pursuant to statutory authority. Thus, at some future time the so alleged "isolated" examples of operations which appellee would be precluded from preforming as a common carrier could become

an important, if not critical, aspect of the appellee's operations. If a shipper's method of distribution changes in the future, it is imperative that the appellee be able to compensate for the change. A restriction would preclude it from doing so in many instances.

Although the appellants care to characterize the appellees' loss as a "small price to pay for the avoidance of the mischief which the grant of unlimited authority . . . would create," (A. 24),* appellee submits that any diminution of its territorial rights would be contrary to the provision of Section 212(c) and of substantial harm to the appellee. The loss to the appellee real and substantial.

If the restrictions are imposed, the appellee would also be faced with the ironical situation of being converted without receiving the substantial benefits which were to accrue under Section 212(c) (A. 24). As a contract carrier, the appellee had the right to contract with entities of the type specified in its permit and to aggressively seek new business within the scope of its authority. *U.S.* v. *Contract Steel Carriers,* 350 U.S. 409 (1956). Allegedly it can now haul for the general public. As a practical matter, however, this is of little consequence because of the restrictions. The service permitted under a restricted certificate would not be responsive to the needs of any segment of

* On what basis the appellants characterize the appellee's loss as a "small" one or make the value judgment expressed herein remains a mystery. Evidence of appellee's past operations is not of record as such operations are not relevant or material (R. 73). Therefore, the appellants have no factual basis for weighing the injury to be suffered by the appellee against the competitive effects on existing carriers even if the Commission had the statutory authority to do so.

the public which the appellee could not serve as a contract carrier. To restrict movements from, to, or between certain wholesale or retail outlets, in fact, restricts service to that performed on behalf of persons operating those wholesale or retail outlets. Thus, the ability to serve the general public is a fantasy. On the other hand, the converted authority would be decimated to the point where the appellee could not provide as complete a service for the shippers as it could and did prior to conversion. The examples which were cited conclusively establish that the loss was real and substantial. The appellants offer an illusion as compensation for that loss.

Furthermore, the Commission does not have the authority to modify the dictates of Congress because of its concern over the results flowing from the application of Section 212(c). It is a function of Congress to weigh the equities prior to legislating and it must be assumed that our legislators were cognizant of the results which would occur through the conversion procedure. The fact that Congress may have erred or acted in a manner inconsistent with the views of the Commission is of no consequence. The legislative change the Commission is attempting to inject by the imposition of the restriction must flow, if at all, from amendatory legislation rather than administrative legislation. See *United States* v. *Cooper Corporation et al*, 312 U.S. 600 (1941) and *Watson* v. *Buck*, 313 U.S. 387 (1941).

4. "Keystone" Type Restrictions Are Inconsistent With the Obligations Of a Common Carrier.

The Commission has held in many proceedings that it could not, consistent with the applicant's common carrier status, restrict its service to particular shippers. See, for example, *Barnett Trucking Co., Common Carrier Applica-*

tion, 41 M.C.C. 303; *Globe Cartage Co., Inc., Common Carrier Application*, 41 M.C.C. 313; and *Kickert Common Carrier Application*, 51 M.C.C. 1. In the instant situation, however, the Commission seemingly does not have trouble imposing such a restriction even though the appellee is to be certificated as a common carrier and is under an obligation to serve the general public.

The appellants attempt to justify the imposition of the restrictions by comparing the instant situation with analagous situations involving the "intended use" test (A. 32) and "plant-site" restrictions (A. 35). The appellee fails to appreciate the significance of these analogies.

Neither analogy is applicable since they involve restrictions imposed at the time the authority is granted. Therefore, no question of the Commission's "taking" a right from a carrier existed.* In the instant cause, this is not true. A substantial property right is being taken. To avoid constitutional implications, a grave overriding public interest would have to exist to necessitate such a "taking." If an interest of this nature existed, Congress would have provided for restrictions of the type imposed by positive, unmistakable statutory language or imposed tests by which such fact could be ascertained. It did neither. The conversion was to be in the words of Senator Lucas "almost automatic" (Hearings 143). The converted carrier need not enter evidence of its past operations, and in the ab-

* This is also true in respect to the imposition of a tacking restriction. Since contract carriers could not "tack", a tacking restriction imposed in a conversion proceeding is not "taking" anything from the carrier in derogation of Section 212(c). For this reason, the decision in *Tar Asphalt Trucking Co.* v. *United States*, 208 F. Supp. 611 (D.N.J. 1962), affirmed per curiam 372 U.S. 596 (1963) is not applicable and, as noted in the appellants' brief, the restriction is not contrary to the literal wording of the statute (A. 20).

sence of protests, evidence of the competitive situation would not be of record. Therefore, the Commission would not have any basis for making the determination of public interest. Congress knew this. It did not feel that such a determination need be made nor did it provide for it. The positive language it used in Section 212(c) evidences this.

Furthermore, the restriction flowing from the "intended use" test is not one concerning who the carrier can serve, but rather what commodities the carrier can carry. The pertinent portion of the definition of "common carrier by motor vehicle" as set forth in the Act, 49 U.S.C. 303(a)-(14), is as follows:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property *or any class or classes thereof* for compensation, whether over regular or irregular routes. . . (emphasis added).

It is provided within the definition that a common carrier may be limited as to the property or commodities which it might carry, but no such provision is made for the imposition of a restriction as to the persons it may serve.

It is recognized that in many instances a commodity restriction will in effect restrict the number of persons who the carrier serves. This restriction flows from the nature of the commodity; the certificate still affords the carrier the right to serve any person desiring to utilize its service consistent with the commodity authorization. The restriction which the appellants would impose upon the appellee would not allow the appellee to serve all shippers who desire to ship the commodities authorized to be carried. The appellee could not provide the service unless the lading

move from, to or between specified wholesale or retail outlets.

The use of an analogy based on a plant site is not apropos. Although the appellants contend that such restrictions are not "unusual" (A. 35), it should be recognized that they are an exception to the rule and are not normally imposed. See *M.I. Boyle & Son, Inc. Extension—Fluorspar*, MC 106965 (Sub No. 144), 15 CCH Fed. Car. Cases Par. 35,341. It should also be recognized that the basis for imposing such a restriction is not applicable herein.

The Commission, by the use of a plant site restriction, attempts to conform the service authorized with the need shown and to protect existing carriers from competition not warranted by facts of record. This is accomplished by limiting the applicants' service to a specific territory, *i.e.* the plant site of the consignor or consignee. Thus, the restriction is not one dealing with the persons who can be served, but rather one which deals with the territory which can be served. The carrier can serve any member of the general public in the carriage of the authorized commodities so long as the shipment originates or terminates at the specific plant site.

The proceedings in which plant site restrictions are imposed involve applications under Section 206 of the Act, 49 U.S.C. 306. Section 208, 49 U.S.C. 308, deals with the terms and conditions which can be imposed in certificates issued pursuant to Section 206. It reads as follows:

> "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not within which, the motor carrier is authorized to operate; and there shall,

at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6)."

Perusal of the above section shows that the Commission has the specific authority to impose territorial restrictions. In the instant case such restrictions are contrary to the specific dictates of Congress that assure the converted carrier authority to serve the same commodities between the same points or within the same territory.

The Commission's approach in the matter also fails to appreciate the fact that the very reasons which justify the imposition of "Keystone" restrictions in contract carriers make them inappropriate in common carrier certificates.

The Court in *Noble* v. *United States*, 319 U.S. 88 (1943), recognized that "Keystone" restrictions were needed in a contract carrier permit to prevent the carrier from making a basic alteration in the characteristics of the enterprise, which ". . . would be a conversion for all practical purposes . . . into a common carrier, a step which would tend to nullify a distinction which Congress has preserved throughout the Act." 319 U.S. 91-92. By contrast, the issuance of a certificate as a common carrier, contemplates service to the public generally, and the imposition of a "Keystone" type of restriction in a certificate is contrary to the obligations and duties of a common carrier, both at

common law and under the Interstate Commerce Act. The Commission obviously knows this to be true, as indicated by the decisions cited above

The restriction placed in appellee's certificate is not authorized by the statute, and is inconsistent with the entire concept of common carriage. In imposing the restriction, the Commission has not only departed from its own precedents, but has exceeded its authority by attempting to abrogate the recognized rights, duties, and obligations of a common carrier.

CONCLUSION.

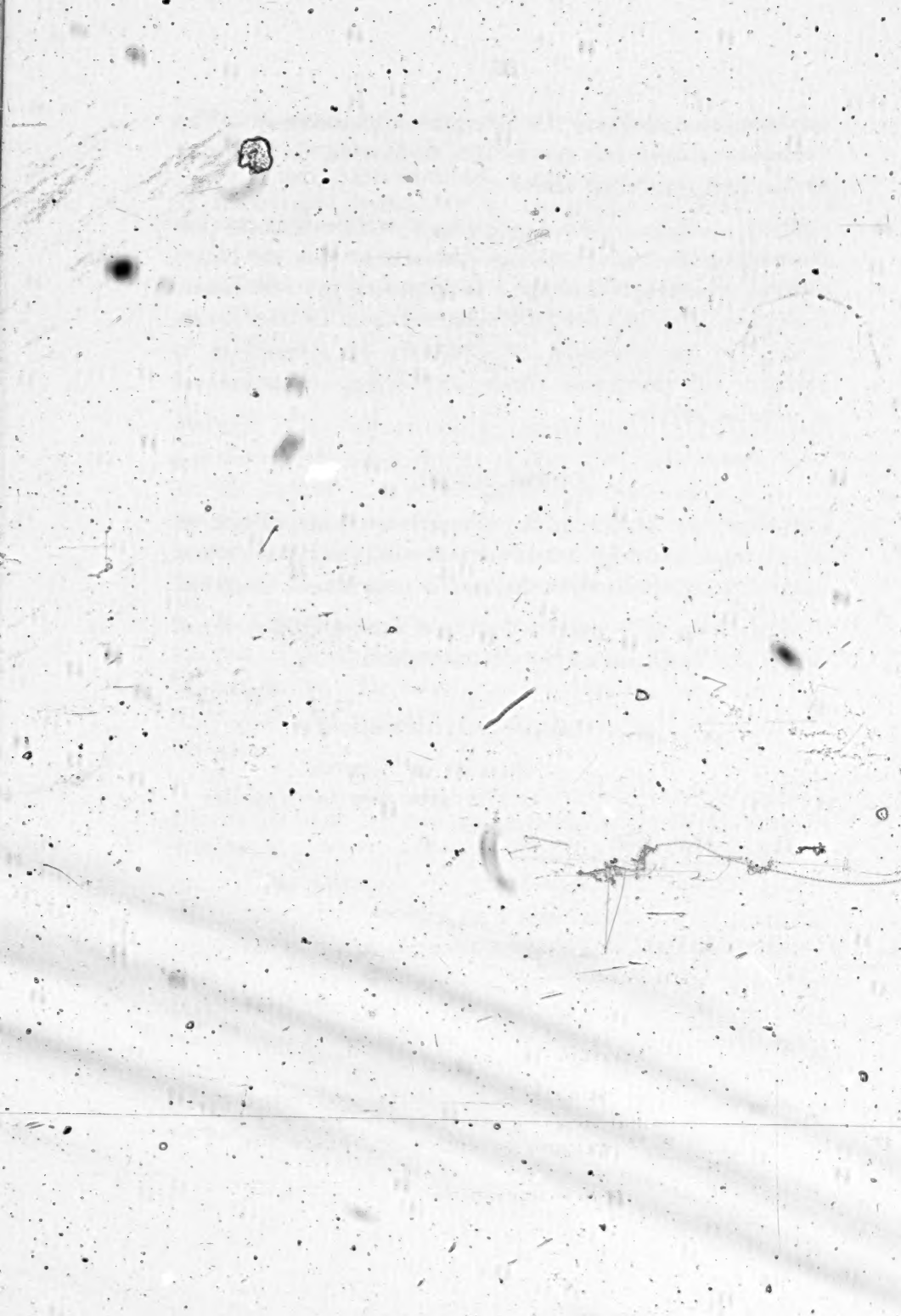
In the final analysis, the Commission's imposition of restrictions must be considered as without its statutory authority and contrary to the specific mandate of Congress.

Wherefore, it is prayed that this honorable Court will affirm the judgment of the district court.

Respectfully submitted,

CHARLES W. SINGER
Attorney for Appellee

September 30, 1963



APPENDIX

STATUTES INVOLVED

Section 5(b) of the Interstate Commerce Act (49 U.S.C. 5(b)) provides:

* * *

> If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . .

Section 203(a)(14) of the Interstate Commerce Act (49 U.S.C. 303(a)(14)) provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes . . .

Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)), as amended August 22, 1957, 71 Stat. 411, provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period

of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 204(a)(1) of the Interstate Commerce Act (49 U.S.C. 304(a)(1) provides:

It shall be the duty of the Commission—

• • •

To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment".

Section 204(a)(6) of the Interstate Commerce Act (49 U.S.C. 304(a)(6)), provides:

It shall be the duty of the Commission—

• • •

To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration; • • •

Section 208(a) of the Interstate Commerce Act (49 U.S.C. 308(a)) provides:

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity

may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6).

Section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b) provides:

> . . . The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304(a)(2) and (6) of this title.

Section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b)), as amended, August 22, 1957, 71 Stat. 411, provides:

> . . . The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6) . . .

Section 212(c) of the Interstate Commerce Act (49 U.S.C. 312 (c)) provides:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

Section 7(c) of the Transportation Act of 1958 (72 Stat. 573-574) provides:

• • •

> . . . the Interstate Commerce Commission shall without further proceeding issue a Certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to said Commission as provided in Part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect.

PROOF OF SERVICE

I, Charles W. Singer, attorney for J. B. Montgomery, Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the thirtieth day of September, 1963, I served copies of the foregoing brief for the appellee on the several parties thereto, as follows:

1. On the United States by mailing copies in duly addressed envelopes with first class postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D.C.; Lee Loevinger, Esq., Assistant Attorney General, Department of Justice, Washington 25, D.C.; Robert B. Hummel, Esq., Attorney, Department of Justice, Washington 25, D.C.; Elliott H. Moyer, Esq., Attorney, Department of Justice, Washington 25, D.C., and Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D.C.; and to Lawrence M. Henry, Esq., United States Attorney for the District of Colorado, Denver, Colorado, with air mail postage prepaid.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert W. Giannane, Esq., its Chief Counsel, Interstate Commerce Commission, Washington 25, D.C., and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D.C.

CHARLES W. SINGER, Attorney for
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address: 33 North LaSalle Street
Chicago 2, Illinois

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 66

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

J. B. MONTGOMERY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

This reply brief is filed to call the Court's attention to a pertinent district court decision rendered subsequent to the filing of briefs in this case.

On October 11, 1963, the United States District Court for the District of Kansas in *Zusich Truck Lines, Inc.* v. *United States* (C.A. No. KC-1640) [1] sustained the Commission's authority, in a Section 212(c) conversion proceeding, to achieve substantial parity between the prior permit containing a Keystone restriction and the new certificate, by limiting the carrier to serving the outlets of particular types

[1] The pendency of this case was noted on p. 10, n. 4, of the Jurisdictional Statement.

711-126—63——1

of businesses. In deciding the *Zusich* case the court noted the pendency of the case at bar before this Court, and expressed its agreement with the prior district court decision in *P. Saldutti & Son, Inc.* v. *United States*, 210 F. Supp. 307 (D.N.J. 1962).[1]

The pertinent portion of the opinion appears at pages 23–28 of the Appendix hereto.

Respectfully submitted.

ARCHIBALD COX,
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Attorney,
Interstate Commerce Commission.

NOVEMBER 1963.

[1] This case is discussed on p. 21 of our main brief.

APPENDIX

In the United States District Court for the District of Kansas

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CIVIL ACTION No. KC–1640

ZUZICH TRUCK LINES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CROUCH BROTHERS, INC., AND NAVAJO FREIGHT LINES, INC., INTERVENING DEFENDANTS

Before HILL, *United States Circuit Judge*, STANLEY, *Chief Judge of the United States District Court*, and DAUGHERTY, *United States District Judge*

HILL, *Circuit Judge*

This is an action under 28 U.S.C. §§ 1336, 1398, 2284, 2321–2325 and 5 U.S.C. § 1009, to enjoin, annul and set aside the report and orders of the defendant, Interstate Commerce Commission, entered in Docket No. MC–C–2156, *Zuzich Truck Line, Inc., Investigation and Revocation of Permit*, 83 M.C.C. 625 (the investigation proceeding). That report also embraces the action taken by the Commission in Docket No. MC–69752, *Zuzich Truck Line, Inc., Modification of Permit* (the grandfather proceeding); Docket No. MC–69752 (Sub. No. 17), *Zuzich Truck Line, Inc., Extension-Various Commodities* (the extension pro-

ceeding); and Docket No. MC-69752 (Sub. No. 16), *Zuzich Truck Line, Inc., Conversion Proceeding* (the conversion proceeding).

At the time the above proceedings were commenced, the plaintiff, Zuzich Truck Line, Inc. (Zuzich), was the holder of a contract carrier permit authorizing it, insofar as pertinent here, to transport in interstate commerce "Packinghouse products, and supplies, restricted to items incidental to and directly connected with the business of the slaughtering of animals and the preservation and sale of meats but not including dairy products" and "canned goods" as set forth in paragraphs 1 and 4(A), respectively, of such permits, between points and places therein designated. This permit in its entirety is attached as Appendix A to the Commission's report, *supra*, 83 M.C.C. at pages 639-641, and was originally issued to George Zuzich, an individual, under the so-called "grandfather" provisions of Section 209(a) of the Interstate Commerce Act, 49 U.S.C. § 309(a). The four proceedings were referred to a Commission Examiner. The investigation, grandfather and extension proceedings were heard upon a consolidated record and the conversion proceeding was heard on a separate record; but, all of them were the subject of a single report by the Examiner as well as the Commission. For purposes of clarity we will, insofar as possible, discuss them separately.

THE INVESTIGATION PROCEEDING

By order dated October 24, 1957, Division 1 of the Interstate Commerce Commission (Commission) instituted an investigation under the authority of Sections 204(c) and 212(a) of the Act, 49 U.S.C. §§ 304 (c) and 312(a), into and concerning the contract carrier operations of Zuzich. The purpose of the

investigation was to determine whether Zuzich, as a contract carrier by motor vehicle, in interstate commerce, of packinghouse products and canned goods had engaged in the transportation of commodities not within the scope of its permit, in violation of Section 209(a) of the Act, 49 U.S.C. § 309(a).

The operations in question consisted of the alleged transportation in interstate commerce of such commodities as the following: Washing compounds (liquid and granules); hydrogenated cotton-seed oil; vegetable-oil shortening; soap; glycerine, in drums; advertising material; sporting goods; jelly, in drums, frozen fruit juice, macaroni products; lemon concentrate; frozen chop suey and egg rolls; spaghetti products; garlic, in bags; canned meats; peanut butter; noodles; oleomargarine; salad oils; edible flour; powdered spice; fresh frozen vegetables; citrus and prune juices; food curing compounds; pickles, in barrels and kegs; tea; frozen citrus juices; and candy. At the hearing, the Commission's Bureau of Inquiry and Compliance (Bureau) as illustrative of the alleged unlawful operations, produced evidence showing that Zuzich had, in fact, transported approximately 51 shipments containing quantities of the above mentioned commodities, in interstate commerce, during the period from December 31, 1956, to September 10, 1957.

The Bureau's position was that the transportation of these commodities by Zuzich was not within the scope of its permit authorizing it to haul "packinghouse products" and "canned goods". Zuzich readily admitted that it had transported such commodities but contended, with one exception, that it was authorized to do so under the above authority as set forth in paragraphs I and 4(A) of the permit. The single exception was the advertising material which Zuzich

claimed the right to transport, not on the basis of any asserted authority, but because it and its predecessor purportedly had transported this material since prior to July 1, 1935.

During the course of the hearing, and in particular the examination of the Commission's employee and witness, Schrier, Zuzich made two requests for the production of Commission documents which it claimed were material to both investigation and grandfather proceedings. The first request was for a report made by Schrier to his superior at the conclusion of his field investigation into Zuzich's operations, which ultimately resulted in the commencement of the instant proceeding. The second request was for reports and other material contained in the Commission's files which allegedly relate to the interpretation and issuance of Zuzich's "grandfather" permit. Both requests were denied by the Examiner and his rulings were sustained by the Commission. Zuzich assigns this as error.

The Examiner found that Zuzich had engaged in operations beyond the scope of its authority in transporting the commodities in question in interstate commerce; but, recommended that no cease and desist order should be entered in view of his recommended findings in the reopened grandfather proceeding. The Commission agreed with the Examiner's findings as to the unlawful operations by Zuzich; but, disagreed with his conclusion and ordered Zuzich to cease and desist from continuing such transportation.

The record discloses that the report and files were requested, not for use upon cross-examination of any witness, but to determine if the formal investigation had been commenced as a result of Schrier's field investigation or as a result of a complaint by another carrier and to ascertain the interpretation placed upon Zuzich's permit by the Commission's employees

while in the process of handling the grandfather application. It is admitted by Zuzich's counsel that the material he desired from the files would probably be confidential material.

We, of course, agree with Zuzich that it was entitled to a full, fair and open hearing as a prerequisite to the validity of the Commission's orders. *Morgan* v. *United States*, 304 U.S. 1. But this does not mean that the Commission was required to furnish internal reports or open up its confidential files to Zuzich to be used for the stated purposes. We think the case of *Jencks* v. *United States*, 353 U.S. 657, is wholly inapplicable here. And, the Jencks Act, 16 U.S.C. § 3500, is not helpful to Zuzich as it applies only to discovery in a criminal prosecution. *Campbell* v. *Eastland*, 5 Cir., 307 F. 2d 478, 486, cert. denied, 371 U.S. 955.

Zuzich further argues that the Commission's files should at least have been turned over to the trier of facts for an *in camera* inspection of the documents so as to determine which of them were not confidential and clearly relevant to the issues before him. The simple answer to this argument, even if it is assumed that such a procedure was proper, is that no request for such an inspection was made by Zuzich.

The primary issue raised in this proceeding was whether Zuzich, by transporting the commodities in question, engaged in operations not within the scope of its permit in violation of 49 U.S.C. § 309(a). That section, in pertinent part, provides that "* * * no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway * * * unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: * * *."

The term or description "packinghouse products" as used in Zuzich's permit has long had a peculiar meaning of its own in the transportation industry. A long list of the commodities that may be transported under the description was first promulgated by the Commission in *Modification of Permits—Packing House Products,* 46 M.C.C. 23, 33-34 (1945), and later modified in 48 M.C.C. 628, 636 (1948). This list was republished with minor changes in Descriptions in Motor Carrier Certificates, 61 M.C.C. 209, 272-273. It would serve no useful purpose and would only unduly extend this opinion to set forth that list of commodities herein. Suffice it to say that the list does include many, if not all, of the commodities in question. However, it is well settled, by both Court and Commission decisions, that carriers possessing permits or certificates of public convenience and necessity authorizing them to transport "packinghouse products" are limited to the transportation of such commodities as come within the meaning of that term and, then, only when they are produced or distributed by, and transported for, or to, a *meat packinghouse.* See, *e.g., Morehouse* v. *United States,* 194 F. Supp. 940 (D. Neb. 1961), aff'd 368 U.S. 348; *Dart Transit Co.—Investigation of Operations,* 54 M.C.C. 429, sustained, *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876 (D. Minn. 1953); *Argo-Collier Trucklines Corp. Ext.—Cleaning Compounds,* 83 M.C.C. 433; *Haugarth—Investigation and Revocation of Certificate,* 83 M.C.C. 395; *Safeway Truck Lines, Inc.—Investigation of Certificate,* 74 M.C.C. 679; *Chrispens Truck Lines, Inc.—Investigation of Operations,* 63 M.C.C. 625.

The term "canned goods" has also acquired a well established meaning in the industry. It has generally been held that the commodity must be a sterile,

bacteria-free food and that its container must be hermetically sealed, of necessity, to maintain its first and intended state. These are the two indispensables of "canned goods" and without them the commodity is not of that category. See, *e.g.*, *Snyder Bros. Motor Freight, Inc.* v. *Archie's Motor Freight, Inc.*, 79 M.C.C. 398, sustained, *Archie's Motor Freight, Inc.* v. *United States*, 14 Fed. Carr. Cas., Paragraph 81, 324 (E.D. Va. 1960); *Bird Trucking Co.—Modification of Certificate*, 61 M.C.C. 311, 314, 315, rev'd on other grounds, *Bird Trucking Company* v. *United States*, 159 F. Supp. 717 (W.D. Wis. 1055).

Zuzich argues that by applying the foregoing definitions of the two terms, "packinghouse products" and "canned goods", to determine the lawfulness of its questioned operations, the Commission applied a definition of the authority contained in its permit which was developed many years after the permit was issued. This, it asserts, deprived it of rights without due process of law. We do not agree. The Commission has merely interpreted the meaning of the permit by applying well established definitions to the terms thereof. Such an interpretation "being simply a definition declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, however, unless found to be clearly erroneous." *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558–559, footnote 4. No such finding is warranted here.

Zuzich also argues that in deciding the lawfulness of the operations in question, the Commission ignored contemporaneous interpretations, made by its own personnel, of the authority contained in the permit. Its position apparently is that the Commission is, in effect, estopped to question the legality of such operations by virtue of certain letters from Commission

employees to its predecessor which it interprets as authorization to transport the commodities for any shipper. We find no merit to this contention.

It is therefore apparent that Zuzich was not authorized under its permit to transport any of the commodities in question since those commodities were either transported for shippers not engaged in the business of operating meat packinghouses or do not come within the accepted definition of canned goods. Accordingly, the cease and desist order was properly entered by the Commission unless, Zuzich asserts, it was entitled to an enlargement of its "grandfather" rights.

THE GRANDFATHER PROCEEDING

Subsequent to the commencement of the investigation proceeding, Zuzich sought, by petition, to reopen the "grandfather" docket and obtain a modification of its permit so that authority would be granted to transport all of the items covered by the investigation proceeding. It sought leave to show that prior to, and continuously since, the statutory date of July 1, 1935, it and its predecessor had transported the commodities involved in the investigation proceeding and, that therefore it was entitled pursuant to 49 U.S.C. § 309 (a) to have its "grandfather" rights enlarged so as to permit the transportation of these commodities free from any doubt as to the legality of such operations. Zuzich alleged in its petition that its terminal in Kansas City, Kansas, was flooded in the summer of 1951, and only a small amount of positive documentary evidence showing that it had engaged in the operations described in the requested modification since prior to July 1, 1935, was saved; but, this documentary evidence together with oral testimony, as set forth in affidavits attached to the petition to substan-

tinte these allegations, would establish its right to such authority.

The "grandfather" docket was reopened for oral hearing on the allegations of Zuzich's petition on a consolidated record with the investigation and extension proceedings. At the hearing Zuzich introduced documentary evidence showing that it had transported some shipments of "packinghouse supplies" and two shipments of "packinghouse products" for a meat packinghouse prior to July 1, 1935. It also introduced exhibits in the form of contracts dated prior to July 1, 1935, providing for the transportation by Mr. Zuzich of many of the commodities in question. Zuzich also presented a list showing hundreds of shipments of the commodities here in question for a five-year period up to and including 1957. These shipments were for both meatpacking and non-meatpacking companies with the tonnage for the latter greatly exceeding that for the former.

In addition to this documentary evidence, plaintiff also presented considerable oral testimony, which is summarized in Appendix E of the Commission's report, supra, 83 M.C.C. at pages 645–647, and will not be detailed here. In substance, this testimony was that the witnesses were familiar with George Zuzich's operations prior to the critical date, *i.e.*, July 1, 1935, and recalled that the commodities in question had been transported by George Zuzich prior to that time. However, their testimony does not indicate the quantity or regularity of such transportation and, in general, established that the majority, if not all, of the shipments of these commodities were either picked up or delivered at one or the other of the meat packinghouses which were served by Mr. Zuzich.

The background facts leading up to the issuance of the "grandfather" permit to George Zuzich are set

forth in great detail in Appendix D of the Commission's report, *supra*, 83 M.C.C. at pages 642-644. We have carefully reviewed and considered those facts and need not summarize them here. It is sufficient to say they clearly show that prior to, and since, the issuance of the permit held by Zuzich as the successor of George Zuzich, it had undergone numerous changes and enlargements.

The Examiner found that Zuzich and its predecessor had been engaged in bona fide operations, to the extent claimed, on and continuously since July 1, 1935, and recommended that its permit be modified as requested. In view of this conclusion, he recommended that Zuzich's extension application be denied. Exceptions were filed to these findings and recommendations. The Commission disagreed with the Examiner and, in denying the requested modification, stated (83 M.C.C. at page 635):

> We are of the opinion that the respondent's evidence falls short of substantiating the allegations contained in the instant petition. The involved "grandfather" permit has received consideration and review on numerous occasions during the past 20 to 25 years. The numerous compliance orders entered by this Commission were modified several times at the request of respondent's predecessor. Now, after many years have elapsed and a permit pursuant to the compliance orders has been issued, we do not believe that the authority contained therein should be modified in the absence of clear and convincing evidence of continuous operations performed since prior to July 1, 1935. Zuzich,

Inc., in its petition which motivated the reopening of this proceeding, claimed to have such evidence available, but it was not forthcoming at the hearing. We, therefore, conclude that the petition herein to the extent that it seeks modification of the authority held by Zuzich, Inc., should be denied.

Zuzich argues that the Commission denied the petition primarily upon a finding that the evidence "falls short" of substantiating the allegations of the petition for modification of the permit, which finding, Zuzich says, was predicated entirely upon a review of the documentary evidence and did not take into account any of the oral testimony adduced in its behalf. Zuzich claims that, having reopened the grandfather case, the Commission should have decided the basic issue, *i.e.*, whether the permit should be modified or enlarged as requested, rather than attempting to compare and correlate the evidence with the allegations of the petition. It further argues that the Commission was influenced by the previous history of the "grandfather" permit and that the basic issue "is not dependent upon substantiation of allegations contained in the petition for reopening, nor upon the extent of past reviews of the proceeding."

The grandfather provisions of 49 U.S.C. §§ 306(a) and 309(a) are referred to as the "grandfather clause" of the Act. Section 309(a) provides that the Commission shall issue a permit to any carrier if it, or its predecessor in interest, "* * * was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * *." This clause confers a special privilege upon those carriers coming within its terms and extends only to carriers plainly

within its terms. *Crescent Express Lines, Inc.* v. *United States*, 320 U.S. 401, 409; *Gregg Cartage & Storage Co.* v. *United States*, 316 U.S. 74, 83; *McDonald* v. *Thompson*, 305 U.S. 263, 266. It contemplates "substantial parity" between future operations and prior bona fide operations as of the statutory date. *Crescent Express Lines, Inc.* v. *United States, supra; Alton Railroad Co.* v. *United States*, 315 U.S. 15. An applicant for a grandfather permit under this clause need not prove that the proposed operations would be consistent with the public interest; he, or it is entitled to the permit, as a matter of right, upon proof of substantial bona fide operations on and continuously since the statutory date. *Motor Freight Express* v. *United States*, 119 F. Supp. 298, 303 (M.D. Penn. 1954), aff'd 348 U.S. 891.

Under the statute, actual and substantial rather than merely potential, sporadic or infrequent, service by the applicant is required before a grandfather permit can be issued. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480, 481; *Gregg Cartage & Storage Co.* v. *United States, supra; United States* v. *Maher*, 307 U.S. 148; *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17 (E.D.N.Y. 1947), aff'd, 331 U.S. 784.

It is well settled that the applicant has the burden of establishing his right to the statutory grant or, in other words, of meeting the standard of proof set forth above. *Alton Railroad Co.* v. *United States, supra; Watson Bros. Transp. Co.* v. *United States*, 59 F. Supp. 762 (D. Neb. 1945). Thus, it was incumbent upon Zuzich to prove that it was engaged in the operations in question continuously since prior to the statutory date of July 1, 1935, and that such operations were actual and substantial, rather than potential, sporadic or infrequent. Since it had this

burden, Zuzich was necessarily required to prove the allegations of its petition for modification of the permit. Accordingly, it is clear that the Commission, by finding that the evidence "falls short" of substantiating the allegations of the petition, did not depart from established principles and establish an entirely new concept. By its finding in this regard, the Commission did decide the basic issue and determined that Zuzich had not met the required burden of proof.

The real question presented then is whether the Commission erred in holding that Zuzich failed to meet the burden of proof imposed upon it. In this connection, Zuzich makes the further contention that the Commission's conclusion is arbitrary, capricious and contrary to the evidence because it adopted the Examiner's findings of fact but ignored those findings and his recommendations in reaching its conclusion and that it considered only the documentary evidence and failed to give any consideration to uncontradicted oral testimony. The Commission contends, however, that it did give consideration to the oral testimony as well as the documentary evidence and, when so considered, Zuzich wholly failed to meet the burden of proof by showing that substantial and actual operations were conducted on and continuously since the statutory date. The Commission asserts that Zuzich failed to show that it had transported commodities other than packinghouse products and canned goods for shippers other than meat packinghouses.

We, of course, must and do recognize that the Commission in numerous instances has relied upon oral evidence in the absence of documentary proof of past operations to sustain an award of "grandfather" rights. See, *e.g.*, *J. B. Montgomery, Inc.—Modification of Permit*, 83 M.C.C. 457, set aside on other

grounds, *J. B. Montgomery, Inc.* v. *United States*, 206 F. Supp. 455 (D. Colo. 1962), prob. juris. noted, 372 U.S. 952; *M. D. Cressy Co., Inc.—Modification of Certificate*, 79 M.C.C. 89. And, on occasion, where the Commission has failed to consider such evidence, its order has been set aside and the case remanded to the Commission with directions to do so. See, *e.g.*, *Bird Trucking Company* v. *United States*, 159 F. Supp. 717 (W.D. Wis. 1955); *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954). But, we think the Commission did consider the oral testimony presented by Zuzich in this case as it was required to do. The fact that the oral testimony was summarized in Appendix E of the Commission's report, *supra*, 83 M.C.C. at pages 645–647, is in itself an indication that the testimony was considered. In addition, the Examiner considered that testimony in making his findings and his statement of facts was expressly adopted, with slight modifications, by the Commission.

We must, however, also recognize that in those cases where the Commission relied upon oral testimony to sustain the award of the permit, it was persuaded that the testimony justified the grant made. And, in other instances, the Commission has held that the oral evidence of the claimed "grandfather" rights was insufficient proof of past operations, and this is particularly true where, as here, the "grandfather" rights have long been verified by the grant of a certificate or permit. See, *e.g.*, *Newsom Trucking Co., Inc., Common Carrier Application*, 71 M.C.C. 663; and *C. & E. Trucking Corporation—Modification of Permit*, Docket No. MC–2941 (Sub-No. 11), decided December 1, 1961.

The law is well settled that the extent of the "grandfather" rights to which an applicant is entitled is

primarily a question of fact which Congress has entrusted to the Commission to determine. *Noble* v. *United States*, 319 U.S. 88, 93; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475; *Alton Railroad Co.* v. *United States, supra; United States* v. *Maher*, 307 U.S. 148.

Our task, of course, ends if the Commission has properly applied the statutory standards. A careful study of the Commission's report, which includes the Appendices attached thereto, leads to the conclusion that the Commission considered very thoroughly all of the evidence with respect to Zuzich's service prior to, on, and since the statutory date and determined that the permit then held by Zuzich reflected all of the "grandfather" rights to which it was entitled. The Commission necessarily found and concluded that the permit reflected "substantial parity" between Zuzich's future operations and prior bona fide operations as of the statutory date. We conclude that the proper statutory standards were applied in making this determination and therefore the Commission's order denying modification of the permit must stand.

The fact that the Commission adopted the Examiner's findings with slight modifications, and rejected his recommendations does not compel a different conclusion. The Commission not only is at liberty to reach its own conclusions upon the evidence but it is required to do so. *Robbins* v. *United States*, 204 F. Supp. 78 (E.D. Penn. 1962); *Convoy Company* v. *United States*, 200 F. Supp. 10, 14 (D. Ore. 1961).

THE EXTENSION PROCEEDING

Contemporaneously with the filing of its petition in the grandfather proceeding and as a "precautionary measure", Zuzich also filed an application for a permit authorizing it to engage in the operations in

question. Thus, if its efforts to obtain a modification of its permit in the grandfather proceeding were unsuccessful, Zuzich sought by this application to obtain the same authority as claimed in the grandfather proceeding by proving that such operations would be consistent with the public interest and the National Transportation Policy, as required by Section 209(b) of the Act, 49 U.S.C. § 309(b). Because of its findings in the conversion proceeding, the Commission treated Zuzich's application as one for a certificate authorizing the operations in question as a common rather than a contract carrier.

Representatives of eleven shippers of the commodities covered by the application testified in support of Zuzich's application. This testimony was to the effect that the shippers had used Zuzich's services in the past, they had found them to be satisfactory and they desired such services to continue. However, the majority of the witnesses conceded that the existing transportation facilities of other carriers in the area were adequate and many of them stated that they had used the facilities of these other carriers and found their services to be satisfactory. In addition, the testimony mentioned in the investigation proceeding concerning the many shipments of the commodities in question between 1952 and 1957 was presented in support of the application.

Zuzich asserted at the hearing that the transportation of the commodities involved represented in excess of 20 percent of its total tonnage and 16 percent of its total revenue. It also asserted that a denial of the application would eliminate the back-hauls on the heavy eastbound movements of its authorized operations.

The application was opposed by numerous rail and motor carriers doing business in the area. The

testimony in their behalf was to the effect that: Either directly or in interline service they were authorized to perform the operations for which Zuzich sought additional authority; they had the necessary equipment to perform the services involved; they were at that time performing such services; and they actively solicited such traffic as Zuzich was then handling. In other words, the opposing carriers' testimony was that they possessed the requisite authority to transport the commodities in question for the eleven supporting shippers and were ready, willing and able to do so.

In view of his recommended findings in the grandfather proceeding, the Examiner found that Zuzich's application should be denied and Zuzich did not except to such finding. However, having denied the modification in the grandfather proceeding, the Commission considered the application on its merits. It found Zuzich had not established that the present or future public convenience and necessity required the proposed operations and, in denying the application, said (83 M.C.C. at page 637):

> We are asked to consider past operations as evidence of a need for the proposed service. However, in cases such as this where an applicant knew or should habe [*sic*] known that it was operating outside of the scope of its authority, a grant of authority based upon such past operations would place a premium on illegal activity. In the circumstances, we do not believe that respondent's past unauthorized operations are entitled to any weight whatever in determining whether the present or future public convenience and necessity require the proposed service. Consequently, we conclude that the application in the extension proceeding should be denied.

Zuzich contends that the Commission erred in determining whether its proposed service would be in the public convenience and necessity by failing to consider the evidence of its past operations and the supporting shipper's desire for the continuance of such operations. It argues that, contrary to the Commission's finding, its past operations in transporting the commodities involved were not unauthorized or known by it to be outside the scope of its permit; but, rather, were conducted under a bona fide belief that it had the right to continue transportation which it says was being performed during the grandfather period. Hence, plaintiff asserts, the operations were lawful and evidence thereof should have been considered. Zuzich further argues that the Commission's decision completely repudiates the principles established by it with respect to past operations carried on under a claim of "grandfather" rights and arbitrarily imposed upon Zuzich a standard of proof both unwarranted and unprecedented. This argument is based upon the Commission's holding that Zuzich "knew or should have known that it was operating outside of the scope of its authority" and that to grant the authority requested would place a premium on "illegal activity".

As previously stated, although Zuzich's application was originally filed under 49 U.S.C. § 309(b), it was treated as one for a certificate of public convenience and necessity under 49 U.S.C. § 307(a). It is well settled that an applicant for a certificate has the burden of satisfying the statutory requirements. The applicant must prove its fitness, *Kroblin Refrigerated Xpress, Inc.* v. *United States*, 197 F. Supp. 39 (N.D. Iowa, 1961), and must establish by a fair preponderance of the evidence that the present or future public convenience and necessity requires authorization of

the proposed operations. *Sloan's Moving & Storage* v. *United States*, 208 F. Supp. 567 (E.D. Mo., 1962), aff'd, 31 U.S.L. Week 3407; *Robbins* v. *United States, supra; Quickie Transport Company* v. *United States*, 169 F. Supp. 826 (D. Minn., 1959), aff'd, 361 U.S. 36. The same rule is applicable with respect to an application for the extension of an existing certificate, *McBride's Express, Inc.* v. *United States*, 173 F. Supp. 539 (E.D. Ill., 1958). One of the basic ingredients in determining whether the public convenience and necessity requires the proposed operations is the adequacy of existing service. *Robbins* v. *United States, supra.* And, the court must sustain the Commission if its findings on the issue of present or future public convenience and necessity are supported by substantial evidence. *Yourga* v. *United States*, 191 F. Supp. 373 (W.D. Penn., 1961); *Patterson* v. *United States*, 178 F. Supp. 771 (W.D. Ark., 1959); *Quickie Transport Company* v. *United States, supra.*

We are convinced the Commission's finding that the public convenience and necessity does not require Zuzich's proposed operations is supported by substantial evidence. The basic ingredient of the adequacy of the existing service is clearly established by that evidence. The testimony of the opposing carriers shows that they possessed the requisite authority to perform such operations and they were ready, willing and able to do so. In addition, the supporting carriers conceded that, while they desired Zuzich's operations to continue, the existing facilities were adequate for their needs and many of them had used those facilities.

The major portion of the evidence in support of the applications consisted of testimony and exhibits concerning Zuzich's past operations and, more particularly, the transportation of the commodities in ques-

tion for the 5-year period from 1952 to 1957. The Commission refused to give this evidence "any weight whatever". Of course, the Commission cannot capriciously ignore evidence but, at the same time, it is not required to accept an applicant's evidence at face value. *Robbins* v. *United States, supra.* In order for evidence of past operations to be entitled to admission and consideration in determining whether there is a present or future need for such operations, they must have been lawful or, at least, conducted under some color of right. See, *e.g., McBride's Express, Inc.* v. *United States, supra; Carl Subler Trucking, Inc., Extension—Citrus Juices,* 78 M.C.C. 707, 713. But, evidence of prior unauthorized operations should be considered in determining public convenience and necessity where such operations were undertaken under color of right or in good faith belief that they were authorized. See, *e.g., Atlantic Greyhound Extension—Fort Jackson,* 78 M.C.C. 211; *Southeastern Motor Line, Inc., Com. Car. Application,* 43 M.C.C. 37.

The question then is whether the past operations relied upon by Zuzich were conducted under color of right. The bulk of the shipments involved in such operations was during the period from 1952 to 1957, which was subsequent to the time the Commission delineated the services that a "packinghouse products" and "canned goods" carrier could lawfully perform. See *Dart Transit Co.—Investigation of Operations,* 54 M.C.C. 429 (1952) and *Bird Trucking Co.—Modification of Certificate,* 53 M.C.C. 708 (1952). The Commission's action in the latter case was later modified, 61 M.C.C. 311, and then vacated and set aside in *Bird Trucking Co.* v. *United States, supra,* but on other grounds. Zuzich was therefore put on notice that its operations during that period were unauthor-

ized. More significantly, however, the history of the "grandfather" case discloses that although Zuzich requested and received numerous modifications of its authority, it never once inquired about or requested the authority to transport the commodities in question. We therefore conclude that the Commission properly refused to give any weight to the evidence of past operations and that it properly denied the extension application.

THE CONVERSION PROCEEDING

By order dated January 3, 1958, and upon its own motion, the Commission instituted this proceeding under Section 212(c) of the Act, 49 U.S.C. § 312(c) to determine whether the permit held by Zuzich at that time should be revoked and a certificate of public convenience and necessity be issued in lieu thereof authorizing Zuzich to operate as a common carrier of the same commodities between the same points or within the same territories, as authorized by the permit.

The Examiner found that Zuzich's operations did not conform to the revised definition of a contract carrier, as set forth in Section 203(a)(15) of the Act, 49 U.S.C. § 303(a)(15), but were those of a common carrier. He recommended that an appropriate certificate of public convenience and necessity be issued to Zuzich authorizing it to operate as a common carrier from and to the points and in the manner described in its permit, as he recommended it to be modified in the grandfather proceeding, and that the separate grants of authority contained therein should not be tacked or joined, directly or indirectly, for the purpose of performing any through service. Zuzich did not except to this recommendation.

The Commission agreed that Zuzich's operations were those of a common carrier rather than a con-

tract carrier and that a certificate of public convenience and necessity should be issued to it but held that such certificate should not authorize the transportation of the commodities involved in the other three proceedings. In addition to imposing the restrictions against tacking or joinder of separate grants of authority as recommended by the Examiner, the Commission imposed a further restriction as follows (83 M.C.C. at page 638):

> It is also noted that part of respondent's authority is subject to so-called Keystone restrictions. In the *Brooks* case the Commission concluded that in instances where Keystone restrictions appear in the permits of carriers whose authority is to be converted, the certificates to be issued in lieu thereof should contain terms which will continue to some extent, at least, the effectiveness of such restrictions. We shall restrict respondent's authority to the transportation of the commodities in question when moving between manufacturing or processing plants or other facilities of the particular establishments involved.

The certificate authorized to be issued to Zuzich by the Commission is set forth as Appendix F of the report, *supra*, 83 M.C.C. at pages 647–649, and will not be included herein. It is sufficient for our purposes to note that the portion of the commodity description set forth in the permit, as follows:

> With persons (as defined in section 203(a) of the Interstate Commerce Act) who operate meatpacking companies, the business of which is the operation of meatpacking companies, for the transportation of the commodities indicated below.
>
> (G) Such merchandise as is dealt in by meatpacking companies and in connection therewith, equipment, materials, and supplies used in the conduct of such business, * * *

would be changed in the proposed certificate to be issued to Zuzich by the Commission's order, to read as follows:

> Such merchandise as is dealt in by meat-packing companies and in connection therewith, equipment, materials, and supplies used in the conduct of such business, when moving to or from manufacturing or processing plants or other facilities of packinghouses, * * *

In this action, Zuzich does not question its conversion to a common carrier but does contend that the Commission exceeded its statutory authority in imposing the restrictions upon the certificate to be issued to it. We must determine the legality of these restrictions in the light of 49 U.S.C. § 312(c), which states that a certificate issued in lieu of a permit "* * * shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

Beyond doubt, the Commission does have the requisite authority under that provision of the statute to impose upon a converted carrier a restriction against tacking or joining separate grants of authority, directly or indirectly, for the purpose of performing any through service. *Tar Asphalt Trucking Co.* v. *United States,* 208 F. Supp. 611 (D.N.J. 1962), aff'd, 372 U.S. 596. That aspect of Zuzich's contention is therefore clearly without merit.

The remaining aspect is more difficult. Before examining the legality of that restriction, it will be helpful to briefly review the authority involved. By its permit, Zuzich was authorized to transport, among other things, packinghouse products and canned goods over certain designated routes. Under generally accepted principles, however, Zuzich could not transport

packinghouse products for any and all shippers but was limited to transporting such products when they were moving from or to a meat packinghouse. Thus, Zuzich did not have unlimited authority to transport those products. As we read the proposed certificate, Zuzich still possesses that same authority and we therefore reject its contention that it has less authority under the proposed certificate than under the then existing permit.

However, Zuzich further argues that in enacting § 312(c) into law, it was the intention of Congress to make a converted carrier a full fledged common carrier of the products covered by its permit and therefore the restriction in question is illegal. In other words, Zuzich claims that upon being converted into a common carrier, the so-called Keystone restriction[1] should have been removed and it should become a common carrier without restriction. The Commission, on the other hand, relies upon its decision in the Brooks case and argues that the "substantial parity" test is applicable and any less restrictive language in the commodity description of the proposed certificate would give Zuzich an "unwarranted windfall". The Commission points out that the type of restriction involved here upon a common carrier was upheld in *Morehouse* v. *United States, supra.*

There is a conflict in the cases on this point. In *J. B. Montgomery, Inc.* v. *United States,* 206 F. Supp. 455 (D. Colo. 1962), prob. juris. noted, 372 U.S. 952,

[1] This restriction derives its name from the case of *Keystone Transp. Co. Contract Carrier Application,* 19 M.C.C. 475. Such a restriction limits "not the commodities which may be transported or the territory which may be served, but the persons or class of persons with whom the carrier may enter into transportation contracts." (*T. T. Brooks Trucking Co., Inc., Conversion Application,* 81 M.C.C. 561, 575).

the court set aside the Commission's order imposing a similar restriction in a certificate to be issued a converted carrier. The basis of the court's decision was that in view of the legislative history of § 312(c) the Commission had no authority to impose such a restriction. However, in *P. Saldutti & Son, Inc. v. United States*, 210 F. Supp. 307 (D.N.J. 1962), the court adopted the position taken by the Commission in this case and held that under § 312(c), the Commission did have the statutory authority to impose a similar restriction upon a certificate to be issued to a converted carrier.

We believe that the Saldutti case is the sounder of the two. In that case, the court stated at page 314:

> Under section 212(c) of the Act, a converted carrier is entitled to receive at the hands of the Commission a certificate that maintains parity with the operating authority contained in its contract carrier permit. The controlling factor is the operating rights authorized by the present permit. * * *

And, further, at page 314 and 315:

> There is no authority under section 212(c) of the Act to issue a certificate for the transportation of commodities not authorized in the permit of the carrier. Since paragraph 2 of the permit does not authorize Saldutti to transport "general commodities", the Commission would have no right to incorporate such authority, or to otherwise enlarge Saldutti's operations, in the certificate to be issued in the conversion proceeding.

We agree that the Commission does not have the authority under § 312(c) "to issue a certificate for the transportation of commodities not authorized in the permit" or "to otherwise enlarge" Zuzich's operations beyond what was authorized in the permit. This

is in accordance with the language of the statute stating that a certificate issued thereunder "* * * shall authorize the transportation * * * of the same commodities between the same points or within the same territory as authorized in the permit." Strictly speaking, the restriction involved here is not a so-called Keystone restriction since Zuzich may render its services to anyone so long as the transportation it performs is of the appropriate products when moving "to or from" the manufacturing or processing plants or other facilities of packinghouses.

We hold that the Commission did not exceed its statutory authority by imposing the questioned restrictions in the certificate it proposes to issue to Zuzich.

CONCLUSION

We are convinced that the orders of the Commission relating to all four of the proceedings involved in this action are valid and should not be vacated or set aside under our limited scope of review. The orders should therefore be *Affirmed*.

Counsel for the defendants will prepare and submit an appropriate order and decree. The judgment of the court shall not become effective until a formal decree is submitted, signed and filed with the Clerk of the Court.

U.S. GOVERNMENT PRINTING OFFICE: 1963

No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

J. B. MONTGOMERY, INC.,

Appellee.

On Appeal from the United States District Court for the District of Colorado

PETITION FOR REHEARING J. B. MONTGOMERY, INC.

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J. B. Montgomery, Inc.

April 17, 1964

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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J. B. Montgomery, Inc., appellee, presents this, its petition for a rehearing of the above entitled cause and, in support thereof, respectfully states:

In affirming the judgment of the District Court, it is respectfully submitted that the Court has raised a matter which the lower Court and the parties had not considered to be in issue. In remanding the case to the Commission,

this honorable Court has dictated that the Interstate Commerce Commission has the authority to limit the appellee's Certificate to bona fide past operations conducted under its Permit. The parties to this cause had conceded that a criterion of bona fide past operations was not applicable under Section 212 (c) of the Act and this position was subscribed to by the District Court. Consequently, the issue was not argued orally or on brief before this honorable Court. The resolution of the issue has a material effect on the construction of Section 212 (c) of the Interstate Commerce Act and the parties hereto. It is therefore equitable that rehearing be granted so that the position of the parties as it relates to this issue may be presented to the Court.[1]

The appellee, constant with the leading administrative decision, *T.T. Brooks Trucking Co., Inc., Conversion Case,* 81 M.C.C. 561 (1959),[2] contends that Section 212 (c) does not require a showing of prior operations under a permit as a prerequisite to conversion and that this section of the Act merely provides for a restatement of the existing contract carrier operating rights in the form of

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[1] As evidenced by the Congressional Record, many carriers harbored a fear that their authority would be abrogated. See *Hearings before the United States Senate Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce,* 85th Cong. 1st Sess., Surface Transportation Scope of Authority of I.C.C., pp. 35 and 182. It is therefore befitting that this honorable Court allow appellee to present its views on this issue since it is the contention of the appellee that the use of a bona fide operations test could result in a diminution of authority contrary to the intent of the legislators.

[2] The Commission in the instant cause, consistent with the *Brooks* case held that past operations were not a criterion in a conversion proceeding. See p. 43 of the Transcript of Record.

a certificate authorizing the converted carrier to perform the same transportation it formerly could as a contract carrier.

Section 212 (c) speaks primarily of "operating authorities" as distinguished from "actual motor carrier operations" in providing the underlying basis for conversion of contract carriers to common carriers. The clear and unambiguous term "authorized" is used in the conversion equation.

Where, as here, operating rights of a converted carrier constitute the predominate language factor in section 212 (c), the scope and extent of the transportation a converted carrier shall be authorized to perform in a certificate issued thereunder is not considered as dependent upon actual physical operations. See 81 M.C.C. at 570.

In the *Brooks* case, *supra,* the Interstate Commerce Commission not only adopts the same position subscribed to by the appellee, 81 M.C.C. at 570, but at a subsequent point in the decision, 81 M.C.C. at 577, reiterates it as follows:

> . . . section 212 (c) differs from other "grandfather" provisions of the statute in that it contains no requirement that the converted carrier prove past bona fide operations, and in that it has for its basis not the actual operations performed by the carrier but those authorized by its existing permits . . .

Continuing, the Commission at page 577, stated:

> . . . this Commission is not given the power by section 212 (c) to revoke dormant segments of operating authority, either as a condition to converting certain other segments of a carrier's authority or otherwise, but that dormant contract carrier operating rights can be revoked only by appropriate proceedings under section 212 (a) and (3) . . . dormancy of operating rights is not an issue to be considered in determining conversion proceedings . . .

Prior to this honorable Court's decision, the judiciary had also unanimously subscribed to the construction which the parties had given to Section 212(c).

The District Court in this cause, for example, specifically found that section 212 (c) did not authorize the Commission to ". . . determine bona fides of prior operations." See 206 F. Supp. at 460. Although reaching contrary conclusions on other issues, the Courts in *P. Saldutti & Sons, Inc.* v. *United States et al.*, 210 F. Supp. 307 (D. N.J. 1962) and *Zurich Truck Lines, Inc.* v. *United States*, 224 F. Supp. 457 (D. Kan. 1963), agreed that the controlling factor in a conversion proceeding is the operating rights *authorized* by the carrier's permit. See, for example, 210 F. Supp. at 314.

This unanimity undoubtedly flows from the statutory language of Section 212 (c) which, as applicable, reads:

> . . . . Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as *authorized in* the permit. (emphasis added)

It would appear that if Congress had intended to equate conversions on the basis of past bona fide operations, the legislators would have made such intent clear by the simple substitution of the words "conducted under" in place of "authorized in."

The appellee, as a contract carrier, was able to provide and institute any type service or movement required of it if such service involved the carriage of the commodities authorized, under contract with the designated type of shippers, within the geographical limits set forth in the permit. If a new type service or movement was required,

it could be instituted if the permit were viable.[3] Under the test established by the Court, the authority of the appellee could be limited to the precise movements which were actually conducted as a contract carrier. The appellee would not be free to institute service involving a new type of movement. This limitation arises solely from the conversion. Although this honorable Court makes it clear that Congress did not intend to disturb any property rights of a converted carrier, the test it espouses will preclude the appellee from instituting services which it could as a contract carrier. Appellee asserts that the abrogation of this right is repulsive to the specific language of section 212 (c) and has no support in the legislative history of the Act.

It is therefore respectfully prayed that this petition for rehearing be granted and that the judgment of this honorable Court, upon further consideration, be modified to decree that on remand, the Commission issue a certificate permitting the appellee to perform the same operations *authorized* under its contract carrier permit.

Respectfully submitted,

CHARLES W. SINGER
Attorney for Appellee

April 17, 1964

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[3] A permit is viable until revoked pursuant to section 212(a). Under Commission precedent, the various types of movements made by the carrier in meeting its obligation under the permit is not an issue in dormancy cases. The Commission is concerned with whether any substantive operations are being conducted and whether the obligation is being met.

APPENDIX

STATUTES INVOLVED

Section 212 (a) of the Interstate Commerce Act (49 U.S.C. 312 (a)) provides

> (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304 (c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309 or 311 of this title or by virtue of the second proviso of section 306 (a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, up-

on reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311 (c), 317 (a), or 318 (a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 212 (c) of the Interstate Commerce Act (49 U.S.C. 312 (c)) provides:

(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

CERTIFICATE OF COUNSEL.

I, Charles W. Singer, attorney for J. B. Montgomery, Inc., appellee, and a member of the Bar of the Supreme Court of the United States, do hereby certify that this petition for rehearing is filed in good faith and not for the purpose of delay.

.....

Charles W. Singer

PROOF OF SERVICE.

I, Charles W. Singer, attorney for J. B. Montgomery, Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the Sixteenth day of April, 1964, I served copies of the foregoing petition for rehearing for the appellee on the several parties thereto, as follows:

1. On the United States by mailing copies in duly addressed envelopes with air mail postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D.C.; Lee Loevinger, Esq., Assistant Attorney General, Department of Justice, Washington 25, D.C.; Robert B. Hummel, Esq., Attorney, Department of Justice, Washington 25, D.C.; Elliott H. Moyer, Esq., Attorney, Department of Justice, Washington 25, D.C.; Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D.C.; and to Lawrence M. Henry, Esq., United States Attorney for the District of Colorado, Denver, Colorado.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert W. Giannane, Esq., its Chief Counsel, Interstate Commerce Commission, Washington 25, D.C., and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D.C.

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